Supreme Court, U. S.
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MICHAEL RODAK, JR., CLER

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1979 No. ____

78-1521

ALAN B. EPSTEIN, SANFORD I. JABLON, RICHARD A. WEISBORD, AND ARNOLD J. WOLF, *Appellants*

v.

ADLER, BARISH, DANIELS, LEVIN & CRESKOFF, A Partnership, *Appellee*

JURISDICTIONAL STATEMENT ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

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OPINION BELOW

The Opinion rendered by The Supreme Court of Pennsylvania in support of its Judgment from which the present appeal is taken is not officially reported. It is unofficially reported at 393 A.2d 1175 (1978) and a copy of the Opinion is included in the Appendix to Appellants' Jurisdictional Statement. (A-37-64)* Also included in the Appendix to Appellants' Jurisdictional Statement are the Opinions rendered by the Superior Court of Pennsylvania (A-15-36) and the Court of Common Pleas of Philadelphia County, Pennsylvania (A-1-14). The Opinion of The Superior Court of Pennsylvania is unofficially reported at 382 A.2d 1226 (1978). The Opinion of the Common Pleas Court of Philadelphia County is unreported.

*References throughout the text of Appellants' Jurisdictional Statement are to the Appendix, which contains the opinions, judgments and other documents from the Record below relevant to this Court's consideration of Appellants' Jurisdictional Statement, and are cited as "A- ".

STATEMENT OF JURISDICTION

1. The judgment of the Supreme Court of Pennsylvania reversing the judgment of the Superior Court of Pennsylvania and reinstating The Final Decree entered by the Court of Common Pleas of Philadelphia County from which this direct appeal is taken was entered on October 6, 1978. (A-64) An Application For Reargument was timely filed on October 20, 1978, and denied by the Supreme Court of Pennsylvania, *per curiam*, on November 9, 1978. (A-65)

Appellants' notice of appeal was duly filed in the Supreme Court of Pennsylvania on November 30, 1978. (A-67) In accordance with the provisions of Title 28 U.S.C. §2101 and Rule 13 of the Rules of the Supreme Court of the United States, this appeal is being timely docketed in this Court.

2. The jurisdiction to review this decision by direct appeal is conferred upon the Supreme Court of the United States by Title 28 U.S.C. §1257(2). The judgment of the Pennsylvania Supreme Court (A-64) from which this appeal is being taken is final under the law of the Commonwealth of Pennsylvania. The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the final judgment on direct appeal in this case:

Bates v. State Bar of Arizona, 433 U.S. 350 (1977)

Bigelow v. Virginia, 421 U.S. 809 (1975)

In Re Primus, ___ U.S. ___, 98 S. Ct. 1893 (1978)

Interstate Circut, Inc. v. Dallas, 390 U.S. 676 (1968)

Ohralik v. Ohio State Bar Association, ___ U.S. ___, 98 S. Ct. 1912 (1978).

3. This case questions the constitutional validity of the following Disciplinary Rules of The Pennsylvania Code of Professional Responsibility:

DR 2-103(A), Pennsylvania Code of Professional Responsibility:

"A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer."

DR 2-104(A), Pennsylvania Code of Professional Responsibility:

"A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client."

4. In the event that this Honorable Court deems this case inappropriate to review by direct appeal, appellants respectfully request the papers and proceedings which have been submitted, be regarded and acted upon as a Petition for Certiorari under Title 28 U.S.C. §2103.

QUESTIONS PRESENTED BY APPEAL

I. Do DR 2-103(A) and DR 2-104(A) of the Pennsylvania Code of Professional Responsibility violate the First Amendment to the United States Constitution in restricting the free flow of constitutionally protected speech by prohibiting an attorney (a) from communicating to clients he had been representing that he has recently left the law firm by which he had been employed and is now practicing law with a new law firm, and that the clients have the right to choose who will continue to represent their legal interests in the future; and (b) from mailing to such clients, who have requested that attorney to continue to represent them, the papers necessary to effect the client's choice of representation for consideration and signature by the client in the privacy of his or her home?

II. Does an injunction which prohibits all communications between an attorney and clients, whom the attorney had been representing, when that attorney on leaving his employer law firm seeks to advise such clients of the fact of his departure and the right of the clients to determine who will represent their legal interests in the future, constitute both an impermissible, overbroad prior restraint on the attorney's freedom of speech, as well as an impermissible restriction of the free flow of constitutionally protected information to the clients, in violation of the First Amendment of the United States Constitution?

III. Is DR 2-103(A) of the Pennsylvania Code of Professional Responsibility, as applied by the Supreme Court of Pennsylvania, unconstitutionally vague by failing to provide reasonable notice to Appellants of the conduct which it was held to prohibit?

RAISING THE FEDERAL QUESTION

Appellants raised the claim that the overbroad, *ex parte* preliminary injunction issued by the trial court violated their rights under the First Amendment of the United States Constitution prior to the commencement of the hearing on appellees' Motion For a Preliminary Injunction; during the preliminary injunction hearing; and, before the state appellate courts. Appellants also raised the claim that a permanent injunction would violate their First Amendment rights in their Proposed Conclusions of Law filed at the close of the hearing. Appellants raised the claim that the final injunction issued by the trial court violated their First Amendment rights at each stage of the state appellate process.

The trial court held that appellants' conduct violated DR 2-104(A) of the Pennsylvania Code of Professional Responsibility and that the First Amendment did not protect such conduct. The Pennsylvania Supreme Court did not cite to, nor rely upon, DR 2-104(A), but rather held that appellants had violated DR 2-103(A) and that the First Amendment neither protected such conduct nor precluded the issuance of the overbroad and sweeping injunction entered by the trial court in this action.

STATEMENT OF THE CASE

Appellants, Alan B. Epstein ("Epstein"), Richard A. Weisbord ("Weisbord"), Arnold J. Wolf ("Wolf") and Sanford I. Jablon ("Jablon") are attorneys, who were employed as associates in the law firm of Appellee Adler, Barish, Daniels, Levin and Creskoff ("Adler, Barish"), from approximately March 1, 1976 until April 1, 1977.[1] During this time they were assigned cases to handle on a day to day basis and did so.[2] Prior to March 1, 1977, appellants decided to leave the employ of appellees and to set up their own practice. After consulting with counsel about what they should, or could, do with respect to notifying clients whose cases they handled, appellants, in conformity with the advice of counsel, began to contact those clients, either in person or by telephone, and advised the clients that they were leaving appellee's firm to set up their own practice. In those instances where a client asked who would handle their cases or requested appellants to do so, appellants stated that the continued handling of the client's case was a matter to be decided by the client.

1. Appellant Epstein actually left the employ of Appellee on or about March 10, 1977. Previous to their employment with appellee, appellants were salaried associates and the partners of appellee were profit sharing attorneys, or partners, of the firm of Freedman, Borowsky and Lorry ("FB&L").

2. The trial court found that all of these clients were clients of appellees and not clients of appellants, solely because appellants were salaried associates, not partners. Appellants dispute this conclusion, but believe its resolution is not essential to the adjudication of the constitutional claims raised in this appeal. Certainly, for purposes of assessing what duties or responsibilities were owed by appellants to the persons whose cases they were handling, the relationship of attorney and client existed. Additionally, appellants introduced substantial evidence that a number of clients came to the Adler, Barrish firm because of their knowledge of, or relationship with, one of the appellants.

They then advised the client that he or she could: (a) have the law firm (appellee) continue to represent them, which would be accomplished by the law firm assigning someone to handle the case; or, (b) have one of the appellants continue to handle the case; or, (c) choose any other lawyer to represent them. To those clients who then expressed an interest in retaining appellants to continue to represent them, appellants stated that they would mail to the clients the papers necessary to effect that choice. To some of those clients, appellants then sent the following:

> (a) A letter, confirming the substance of the oral conversation, restating the client's right to select counsel and describing the other documents which were enclosed (A-59);
>
> (b) A proposed form of letter, unsigned, addressed to appellee stating that the client knew of his right to select his counsel, notifying appellee that the client had elected to discharge appellee and retain one of the appellants and directing appellee to deliver his file to the appellants (A-60);
>
> (c) A proposed form of fee agreement, with appellants (A-61);
>
> (d) An addressed, stamped return envelope.

Such correspondence was actually sent to approximately 20 clients. Of those, approximately 10 persons returned the signed documents to appellants.[3]

No client was asked to agree to, or sign, anything in the presence of any of the appellants. Nor did any of the appellants request or recommend that any client elect to have him, or one of his new partners, continue to represent the client.

Upon learning that appellants had commenced such communications, appellee filed a Complaint in

3. At least one client, upon receiving this correspondence discussed it with his union representative and with certain partners of appellee.

Equity with the Court of Common Pleas of Philadelphia County, where they and appellants maintained their offices. The Complaint alleged that appellants' threatened communications with clients constituted a tortious interference with contracts between appellee and its clients. Preliminary and permanent injunctive relief was sought by appellee. On the pleadings, appellee obtained an *ex parte* preliminary injunction from a judge of the Court of Common Pleas of Philadelphia County, despite the fact that they made no effort to give notice to appellants, nor did they then post a bond.[4]

The preliminary injunction provided;

"(1) That an injunction shall issue, preliminary until hearing and perpetual thereafter, enjoining and restraining the defendants Alan B. Epstein, Richard A. Weisbord, Arnold J. Wolf and Sanford I. Jablon, and all persons acting in concert with them or otherwise participating with them or acting in their aid or behalf, from

(a) Interfering in any manner or for any period of time with the clients of plaintiff;

(b) Using any document or any files of the clients of plaintiff in connection with any planned or pending litigation or claim, asserted or to be asserted;

(c) Using any purported authority, oral or in writing, or any power of attorney which might purport to allow defendants or any of them to act on behalf of any client of plaintiff;

(d) Depositing or using in any manner whatsoever the proceeds of any check made payable to plaintiff and/or any of its partners

4. A bond was posted several days later, after appellants objected to the entry of the injunction without the posting of a bond.

or to defendants, which check or proceeds relate to any of the past or present business of the plaintiff involving its clients;

(e) Directing any postal authorities to divert writings or communications which might be addressed to plaintiff, its partners or defendants at Second Floor, Rohm and Haas Building, Independence Mall West, 6th and Market Streets, Philadelphia, Pennsylvania 19106 or any other designated address;

(f) Refusing to turn over to plaintiff any retainers which defendants might have obtained as a result of their aforesaid conduct;

(g) Such other, further and different relief as this Honorable court may deem just and proper.

(2) That true but uncertified copies of the Complaint and of this Order and Rule may be served upon each of the defendants.

(3) That plaintiff, its attorneys or agents designated by plaintiff, has leave to serve true but uncertified copies of this Order and Rule upon any of the defendants and upon any of the persons acting in concert with them or otherwise participating with them or acting in their aid or behalf."

At appellants' request, the hearing on appellees' Motion For A Preliminary Injunction, which commenced on April 11, 1977, became a final hearing.

On April 22, 1977, within the time provided by Pennsylvania Rule of Civil Procedure 1509 for filing preliminary objections to a complaint, the trial court ruled that appellants would not be permitted to file their preliminary objections to the complaint, despite the absence of any rule authorizing such a prohibition. The trial court also refused appellants' request during the four week hearing to narrow the scope of the restraining order.

The testimony concluded on May 4, 1977, and on May 5, 1977, the trial judge entered a Final Decree (A-13), which was followed by an Opinion, including findings of fact and conclusions of law. (A-1)

Appellants filed an immediate appeal to the Superior Court of Pennsylvania and, although denied a stay in both the trial court and the Superior Court, were granted an expedited appeal. The case was placed on the June, 1977 argument list. On December 28, 1977, the Superior Court rendered its decision reversing the trial court and dismissing the complaint. (A-36) The opinion of the Superior Court, per Judge J. Sidney Hoffman, held *inter alia* that, as a matter of state law, there was no unlawful solicitation that could form the basis for tortious interference with contractual rights of Appellees. Judge Edmund B. Spaeth concurred in the result, but would have held that regardless of state law, appellants' conduct was protected under the First and Fourteenth Amendments to the United States Constitution, and this Court's ruling in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Three judges dissented without opinion.

Appellee immediately filed an appeal to the Supreme Court of Pennsylvania and there obtained a stay of the Superior Court's judgment. That court also accelerated the matter to place it on the April, 1978 argument list. After the case was briefed and argued in the Pennsylvania Supreme Court, this Court decided *In Re Primus*, ___ U.S. ___ 98 S. Ct. 1893 (1978) and *Ohralik v. Ohio State Bar Assn.*, ___ U.S. ___, 98 S. Ct. 1912 (1978). Also, the Disciplinary Board of the Supreme Court of Pennsylvania, which had been investigating the matter with respect to appellant Epstein[5] concluded that his "conduct was not in violation of the

5. Of the four appellants, only Mr. Epstein had actually sent out any letters prior to the entry of the preliminary injunction and none were sent thereafter.

Code of Professional Responsibility and . . . dismissed the allegation made against him. . . ."[6]

On October 5, 1978, the Supreme Court of Pennsylvania handed down its opinion reversing the judgment of the Superior Court and directing that the final injunction entered by the trial court be reinstated. The majority opinion relied on *Ohralik, supra,* to establish that appellants' conduct was not protected by the First and Fourteenth Amendments to the United States Constitution.[7] Mr. Justice Manderino dissented, pointing out that appellants truthfully and effectively advised the clients of the choices open to them, and that appellants' conduct was clearly distinguishable from that of the lawyer in *Ohralik* in that there was no overreaching or pressure on clients. (A-63)

Appellants filed a timely Application For Reargument in The Supreme Court of Pennsylvania, which was denied, *per curiam,* without opinion on November 9, 1978. (A-65) Appellants filed their Notice of Appeal (A-67) in the Supreme Court of Pennsylvania on November 30, 1978. They bring this appeal to review the final judgment of the Supreme Court of Pennsylvania.

6. The letter from the Disciplinary Board was sent to the Prothonotary of the Supreme Court for distribution to the justices, but was returned since all argument and submissions were closed.

7. The trial court's Opinion cited to, and relied upon, DR 2-104, but does not mention, at all, the express exception in DR 2-104(A)(1). Perhaps because appellants' communications were so obviously to persons defined in DR 2-104(A)(1) as to preclude the application of DR 2-104(A), the Pennsylvania Supreme Court never mentioned that disciplinary rule, but cited to and relied solely upon DR 2-103(A) to find appellants' conduct improper.

PRESENTATION OF SUBSTANTIAL FEDERAL QUESTIONS

I. DR 2-103(A) and DR 2-104(A) of The Pennsylvania Code of Professional Responsibility Violate the First Amendment by Prohibiting the Free Flow of Constitutionally Protected Speech.

In recent years this Court has repeatedly held that the "consumer's concern for the free flow of commercial speech . . .", truthful in content and not coercive in presentation, is sufficiently important to secure protection under the First Amendment. That protection is extended even in the face of the legitimate interests of states to maintain high degrees of professionalism and public confidence. *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977); *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976).

In *Ohralik v. Ohio State Bar Assn.*, ___ U.S. ___, 98 S.Ct. 1912 (1978), this Court held that in-person solicitation by an attorney, which "demands an immediate response, without providing an opportunity for comparison or reflection . . .," may be prohibited by a state, since the aim of such solicitation may be to "provide a one-sided presentation and to encourage speedy and perhaps uninformed decision-making . . . [without the] opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities or persons close to the solicited individual." *Ohralik*, 98 S.Ct. at 1919. Such untruthful and/or high pressure tactics contravene the individual and societal interests, identified in *Bates*, in facilitating "informed and reliable decision-making". *Bates*, 433 U.S. at 364. But no such facts or circumstances exist in the case at bar.

Appellants, as lawyers and as citizens, shared the concerns expressed by this Court in *Bates* and *Ohralik* and it was precisely those concerns and their desire to avoid any misrepresentation or overreaching, even inadvertently — or even the appearance of such conduct

— that led them to consult with independent counsel; to limit their in-person contacts with clients to a factual statement that they were leaving appellees' employ and that the clients had the right to determine who would continue to represent them; to avoid making any request that the client choose them and to confirm all of this in writing sent to the client's home where the client could consider, compare and consult with others before making any final decision. Thus, the conduct of appellants is dramatically and unmistakably different from that of the lawyer in *Ohralik*.

That the communication between appellants and the clients was protected by the First Amendment is equally clear. The "speech" at issue, here, served not only the individual interests of the lawyers and clients, but also societal interests in "assuring informed and reliable decision-making." *Bates, supra* at 364. Appellants were communicating important information, which the clients had a right to and a need, know.[8] Absent appellants informing the clients of the choices available to them in selecting who would continue to represent their interests, the clients obviously would have been kept in ignorance. Thus, the First Amendment must protect the rights of the lawyer and the client to have the lawyer inform the client of the fact that the lawyer is moving to a new firm and the fact that the client has the right to decide whether or not he wants the lawyer to continue to represent his or

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8. Pennsylvania does not prohibit attorneys from leaving the employ of one law firm and going into practice with another firm or on their own. Nor does Pennsylvania prohibit clients from changing lawyers. Under Pennsylvania law, any person may recommend to any other person that he or she change lawyers. *Richette v. Pennsylvania R.R. Co.*, 410 Pa. 6 (1963). And, as recognized by the trial court in issuing the injunction, Pennsylvania does not prohibit a client from choosing to have an attorney continue to handle their case after the attorney changes law firms. (A-10)

her interest. *Bates v. State Bar of Arizona, supra; Va. Pharmacy Bd. v. Va. Consumer Council, supra.*

There is, moreover, another equally compelling reason for recognizing the application of the First Amendment's protections to appellants' conduct. Appellants were "contacting and/or communicating with" — and are now enjoined from "contacting and/or communicating with" — persons whose legal matters they represented, *persons with whom they had existing attorney-client relationships.* The professional relationship of lawyer and client is, essentially, a personal one in which the client must place his trust and confidence in the lawyer handling his case. A necessary *quid pro quo* of establishing such a relationship is the obligation of the lawyer to advise the client of the client's legal rights and responsibilities. Indeed, if the ABA Code of Professional Responsibility expressly admonishes lawyers "to educate laymen [and the public at large] to recognize their problems, to facilitate the process of intelligent selection of lawyers . . .", *a fortiori* every client has the right to expect nothing less of his lawyer. See EC 2-1, *ABA Code of Professional Responsibility.* And, the client whose communications with his lawyer are personal, and in-person, has a right to expect personal, and in-person, communications from his lawyer concerning his right to select his own counsel.

Thus, the existing attorney-client relationship between appellants and individuals whose cases appellants were handling dramatizes the distinction between the facts present here and those in *Ohralik.* Neither the prospective client nor society had any particular interest in assuring that the lawyer in *Ohralik* make an in-person, high pressure communication with the injured party. Here, however, both the clients represented by appellants, and society, have an interest in allowing, indeed encouraging, personal, truthful, non-coercive contact between appellants and the

clients whose personal legal matters they were handling.

In *N.A.A.C.P. v. Button,* 371 U.S. 415, 429 (1963), this Court stated that constitutionally protected speech could not be stripped of its protection merely by labeling it "solicitation". *Bates v. State Bar of Arizona, supra,* reaffirms this principle. And in *Ohralik* this Court stated that the actual conduct of the lawyer had to be examined to ascertain whether or not it was within the scope of constitutional protection. 98 S. Ct. at 1923; *see also, Edwards v. South Carolina,* 372 U.S. 229, 235 (1963). Yet, the Pennsylvania Supreme Court merely labeled appellants' conduct "solicitation" and then, reading *Ohralik* as making "plain that after *Bates,* states may constitutionally impose sanctions upon attorneys engaging in conduct which violates these disciplinary rules [DR 2-103-(A)], even though the conduct involves commercial speech (A-44)", proceeded to uphold the trial court's sweeping injunction, without demonstrating how appellants' conduct fell within that area which this Court held was subject to regulation. Such a reading of *Ohralik* totally repudiates *Bates* and *Va. Pharmacy Bd.,* and cannot prevail.

There was no evidence, nor any finding of fact by the trial court, that appellants *ever* — in person or in writing — suggested to any of the clients to change their lawyer. Nor did they recommend that any of the clients choose to have appellants continue to represent them. Appellants merely advised their clients that they had a right to choose whomever they desired to continue to represent them and provided in a letter sent to the client's home, a form of letter discharging appellees and a form of contingent fee agreement with appellants. Appellants' statement to the clients concerning the individual client's rights was not in any manner or degree untruthful or biased, nor was there any finding of such by the trial court.

"The listener's interest is substantial. . . ." *Bates,*

433 U.S. at 364. Yet, the Pennsylvania Supreme Court has read this Court's decisions in *Bates* and *Ohralik* as permitting it to punish — indeed to enjoin — conduct which provides the listener with important information as to what his rights are, even where the information was communicated in a manner and form carefully designed and carried out to avoid, even unintentionally, the risks of misrepresentation and overreaching. *Cf. In Re Primus, supra* 56 L.Ed.2d at 437.

If the decision of the Pennsylvania Supreme Court stands, will lawyers who change firms be permitted personally to so advise clients whose personal legal matters they have handled for years? Will they be permitted to advise these clients that the clients have the right to choose who will continue to represent them? Does not the client's need to know out-weigh any right of the law firm to protect its pecuniary interest in its clients? Does not the client have a right to such information, rather than being "kept in ignorance"? Can the answer to these constitutional questions turn on whether the lawyer is a partner, stockholder, salaried associate, profit sharing associate, etc.? If the attorney representing the client cannot so inform the client, how will the client obtain such information? Certainly not from the law firm such as appellee herein. [9] And, if appellee can inform the clients of their rights, can it be precluded from advising the clients how to exercise their rights?

Pennsylvania has applied DR 2-103(A) and 2-104(A) in such a manner as to affirmatively "inhibit the free flow of commercial information and to keep the public in ignorance". *Bates, supra* at 365. This is

9. The record established that appellee merely advised clients that their cases had been reassigned to another attorney, and said nothing of the clients' right to object or to choose to continue to be represented by the departing lawyer.

precisely the type of suppression of information which *Bates* condemned as violative of the First Amendment. Clearly the decision of the Supreme Court of Pennsylvania in this case hinders crucial communication from a lawyer to clients, whose cases he has been handling, in spite of the absence of any misrepresentation or overreaching and the absence of any reasonable alternative for communicating that information to the clients. The state has no legitimate interest in doing so, and certainly none which overrides the policies and guarantees of the First Amendment.

II. The Injunction Issued by the Trial Court Against Appellants and Reinstated by the Supreme Court of Pennsylvania is Overbroad and Constitutes an Impermissible Prior Restraint of Appellants' Constitutionally Protected Rights of Free Speech.

Where regulation in the area of the First Amendment's protected activity is concerned, "precision of regulation must be the touchstone." *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963). *Accord, Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968); *Winters v. New York*, 333 U.S. 507 (1948). "Because First Amendment freedoms need breathing space to survive, government may regulate in [this] area only with narrow specificity." *N.A.A.C.P. v. Button*, 371 U.S. at 433. "Broad prophylactic rules in the area of free expression are suspect." *Id.* at 438. Despite these time honored and oft repeated mandates (see, e.g., *In Re Primus, supra*), the trial court entered, and the Supreme Court of Pennsylvania reinstated, an injunction that not only lacked "precision" and "specificity", but went far beyond any conduct which the state could, constitutionally, prohibit.

The Supreme Court of Pennsylvania, by reinstating the trial court's Final Decree approved a prior restraint in the form of an injunction against *all* communication which was directed to specific individuals rather than to the general public, whether in person, by telephone or in writing, except formal announcements. It was without limit as to the time, place or subject matter of the communications enjoined. For example, appellant Jablon is enjoined from communicating with his father who is a business client of appellee, and all of the appellants are enjoined from personal, social, business and political communications with all former clients regardless of any prior relationship between them. Even if this Court were to permit (a) enforcement of DR 2-103(A) and DR 2-104(A) under the facts present here and (b) enforcement by injunction in the absence of clear and convincing evidence of why an injunction rather than money damages is required, there is no compelling public need — indeed, no evidence or finding of any need — to enjoin appellants from doing anything other than precisely what is prohibited by DR 2-103(A) and DR 2-104(A).

Appellees, in seeking to restrict the free flow of truthful information, must bear a heavy burden to prove that such restriction is necessitated by a compelling public interest and that no other, lesser restriction will suffice. *Linmark Associates Inc. v. Willingboro*, 431 U.S. 85 (1977); *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Jacoby v. State Bar*, 19 Cal. 3d 359 (1977). Appellee never introduced a scintilla of evidence, nor is there any finding of fact which supports the conclusion, that an injunction was necessitated by a compelling public interest. For example, there is no evidence that appellants would not abide by a declaratory judgment; [10] that damages could not be measured; or, that if an injunction was necessary one more narrowly focused on the specific conduct thought to be improper could not have been drawn.

The final injunction goes far beyond the prohibition of even any alleged improper conduct and prohibits clearly lawful and constitutionally protected communication. On this basis alone it is unconstitutional. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

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10. The evidence is clear, for example, that appellants sought the advice of independent counsel prior to leaving appellees' employ in order to avoid taking any improper action. They even patterned the form letters they prepared after letters used by appellee's partners when they had left their former employ.

III. DR 2-103 (A) As Applied by the Supreme Court of Pennsylvania is Unconstitutionally Vague in Failing to Provide Reasonable Notice to Appellants of the Conduct which it was Held to Prohibit.

The rationale behind the longstanding rule that "precision of regulation must be the touchstone" of regulation in the area of the First Amendment, *N.A.A.C.P. v. Button*, 371 U.S. at 483, is two-fold: First, that "legislation must not be so vague, the language so loose, as to leave those who have to apply it too wide a discretion . . . ." *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 694 (1957); second, that "all persons are entitled to be informed as to what the State commands or forbids." *Papachristou v. City of Jacksonville*, 405 U.S. at 162. Any other rule would chill the free and full exercise of First Amendment freedoms. Thus, where the restrictions imposed by statute or rule are so general or vague as to permit those responsible for enforcement to apply it in such a manner as to infringe upon protected rights, *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968), or where it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. . .", *Papachristou v. City of Jacksonville*, 405 U.S. at 162, the statute or rule is unconstitutional and unenforceable.

In the case at bar, the only rule of conduct which the trial court's opinion mentions as having been violated by appellants is DR 2-104. (A-11) Surprisingly, however, the trial court neither mentions, nor cites, any of the exceptions to DR 2-104, especially exception "(1)" [11] The Pennsylvania Supreme Court, however, no

11. "A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client." DR 2-104(A)(1)

doubt realizing the applicability of that exception, rested its decision solely on DR 2-103(A), concluding that appellants "recommended their own employment, even though clients of Adler, Barish did not seek . . . [their] advice 'regarding employment of a lawyer'." (A-43-44)

One may search the record and the trial court's Opinion in search of any evidence or finding of fact that any of the appellants "recommend[ed] employment . . . of himself, his partner or associate . . ." to any person, including, but not limited to, clients whose cases they had handled at Adler, Barish, and such search will be in vain. There simply is no such evidence, because it was not done! Indeed, the only explanation by the Pennsylvania Supreme Court as to how appellants' conduct allegedly transgressed DR 2-103(A) is a statement in footnote 10 of its Opinion that "[Appellants'] contacts make express their interest in Adler, Barish clients' cases, while announcements [permitted by both the disciplinary rules and the Final Decree], at most, only suggest the same . . . ." (A-47)

Neither the trial court, nor the Pennsylvania Superior Court, nor the Disciplinary Board of the Supreme Court of Pennsylvania found that DR 2-103(A) prohibits expressions of interest by a lawyer in continuing to represent someone in a legal matter. Appellants submit that the interpretation applied by the Supreme Court of Pennsylvania to the reach of DR 2-103(A) is so foreign to any reasonable reading of the language of the rule that the rule failed to give appellants fair notice of the conduct that the Pennsylvania Supreme Court has now held that rule forbids.

CONCLUSION

On the basis of the authorities and argument set forth above, this Honorable Court should set this matter down for plenary hearing and decision and thereafter reverse the final judgment of the Supreme Court of Pennsylvania.

Respectfully Submitted,

PATRICK W. KITTREDGE, ESQ.
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Of Counsel:
COHEN, SHAPIRO, POLISHER,
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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 1979, three (3) true and correct copies of Appellants' Jurisdictional Statement were personally served on Patrick T. Ryan, Esquire, as counsel for Appellee, at his office at 1100 PNB Building, Philadelphia, Pennsylvania, 19107. I further certify that all parties required to be served have been served.

PATRICK W. KITTREDGE, ESQ.
ALAN M. LERNER, ESQ.
JOSEPH M. DONLEY, ESQ.
12 South 12th Street
Twenty-second Floor, PSFS Building
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Attorneys for Appellants

APPENDIX

IN THE
COURT OF COMMON PLEAS
OF PHILADELPHIA

ADLER, BARISH, DANIELS, LEVIN AND CRESKOFF, A PARTNERSHIP *Plaintiff*	:	April Term, 1977
vs.	:	
ALAN B. EPSTEIN AND RICHARD A. WEISBORD AND ARNOLD J. WOLF AND SANFORD I. JABLON *Defendants*	:	No. 195 In Equity

OPINION

CHARLES P. MIRARCHI, JR., A. J.

HISTORY:

On April 4, 1977, plaintiffs filed a Complaint in Equity seeking a preliminary injunction against the defendants and alleging immediate and irreparable injury should an injunction not be entered immediately. On that date, this Court entered an Order preliminarily enjoining and restraining the defendants from interfering with the plaintiff 's clients in the manner set forth in the said Order, which is a part of this record. In addition, on April 4, 1977, this Court granted a Rule on the defendants to show cause why a preliminary injunction should not be issued, and a hearing was fixed

for April 7, 1977. However defense counsel was unavailable on that date, and the hearing began on April 11, 1977.

On April 18, 1977, at defense counsel's request, this Court agreed to hear this matter as a final hearing and incorporated all testimony previously given as part of the final hearing.

On May 4, 1977, testimony was concluded, and on May 5, 1977, less than twenty-four (24) hours after the close of the hearing, this Court entered a Final Decree as follows:

> "AND NOW, to wit, this 5th day of May, 1977, it is hereby — ORDERED and DECREED — that the defendants, ALAN B. EPSTEIN, RICHARD A. WEISBORD, ARNOLD J. WOLF and SANFORD I. JABLON, and all persons acting in concert with them or otherwise participating with them or acting in their aid or behalf, are permanently enjoined and restrained from contacting and/or communicating with those persons who up to and including April 1, 1977, had active legal matters pending with and were represented by the law firm of ADLER, BARISH, DANIELS, LEVIN and CRESKOFF, except that:
>
> "1. Nothing in this Final Decree shall be construed to preclude the defendants from announcing the formation of their new professional relationship in accordance with the requirements of DR 2-102 of the Code of Professional Responsibility.
>
> "2. Nothing in this Final Decree shall preclude those persons who, up to and including April 1, 1977, had active legal matters pending with and had been represented by the law firm of ADLER, BARISH, DANIELS, LEVIN and CRESKOFF from voluntarily discharging their present attorney and selecting any of the defendants, or any other attorney, to represent them.

> "It is further ORDERED and DECREED that the bonds now entered and to be entered shall be dissolved thirty-one (31) days from the date of this Final Decree unless an appeal has been taken."

On May 6, 1977, the defendants appealed the decision of this Court.

FINDINGS OF FACT:

After hearing the testimony presented by both plaintiff and defendants, calling certain witnesses as the Court's own witnesses and reviewing the physical evidence presented by both sides, this Court makes the following findings of fact:

1. Plaintiff is a partnership known as ADLER, BARISH, DANIELS, LEVIN and CRESKOFF (hereinafter called ADLER, BARISH) with law offices at the Rohm and Haas Building, Philadelphia, Pennsylvania. The partners of ADLER, BARISH are AVRAM G. ADLER, MARVIN I. BARISH, MARVIN J. LEVIN, ROBERT C. DANIELS, ARNOLD LEVIN and HOWARD J. CRESKOFF.

2. Defendant, ALAN B. EPSTEIN, is an attorney who was a salaried employee of ADLER, BARISH from on or about March 1, 1976 until he was terminated on March 10, 1977. Defendants, RICHARD A. WEISBORD, ARNOLD J. WOLF and SANFORD I. JABLON, are attorneys who were salaried employees of ADLER, BARISH from on or about March 1, 1976 until they were terminated on April 1, 1977.

3. Prior to February 27, 1976, the partners of ADLER, BARISH practiced law with ABRAHAM E. FREEDMAN, Esq.; in the firm known as FREEDMAN, BOROWSKY and LORRY (hereinafter called F B & L). Though not identified in the usual manner as partners in F B & L the partners of ADLER, BARISH had all of the indicia of a partner in F B & L. The partners of

ADLER, BARISH shared fully in the profits, losses and assets of F B & L. They each had capital accounts, shared in depreciation, charitable and political contributions of F B & L, were carried in MARTINDALE-HUBBEL as partners, and were supplied informational returns for the partnership income tax returns prepared and filed by ABRAHAM E. FREEDMAN. The partners of the ADLER, BARISH firm had a pecuniary interest in all cases pending at F B & L on February 27, 1976, in the composite amount of forty-four (44%) percent.

4. Prior to February 27, 1976, the defendants were salaried employees of F B & L with no pecuniary interest in the cases or assets of that firm.

5. On February 27, 1976, the plaintiffs withdrew from F B & L transferring approximately 1300 case files to the ADLER, BARISH offices in the Rohm & Haas Building.

6. On April 5, 1976, the ADLER, BARISH partnership and the F B & L group entered into a written agreement (D-2) whereby the same financial interest in those cases in existence prior to February 28, 1976, was preserved, for each group, i.e. the ADLER, BARISH partnership and the F B & L group. The partners of ADLER, BARISH were specifically given custody and control of those files that were transferred by the ADLER, BARISH firm at the creation of that firm.

7. The defendants left F B & L to become salaried employees of the ADLER, BARISH firm.

8. The defendants have never had a pecuniary, financial or proprietory interest in any of the cases transferred from F B & L to ADLER, BARISH. The defendants only interest in these cases has been that interest associated with the fulfilling of the duties and responsibilities of a litigation attorney assigned to handle a particular case.

9. As a result of the agreement of April 5, 1976, and the individual plaintiffs' pecuniary interest in and relationship to F B & L prior to leaving F B & L, the clients whose files were transferred on or about February 27, 1976, became clients of the ADLER, BARISH partnership.

10. From March 1, 1976 until April 1, 1977, ADLER, BARISH opened approximately 639 additional files. The clients represented by these 639 files are clients of ADLER, BARISH.

11. The defendants have no pecuniary, financial or proprietory interest in any of the 639 files opened by ADLER, BARISH during the period March 1, 1976 through April 1, 1977.

12. While salaried employees of ADLER, BARISH, the defendants have been assigned and did fulfill the duties of a litigation attorney under the supervision, control and direction of the ADLER, BARISH partners.

13. Sometime in the fall of 1976, the defendants decided to leave the employment of the ADLER, BARISH firm and to form their own firm. No notice of their intention was given to ADLER, BARISH.

14. In furtherance of their plan to form their own firm, the defendants, in October, 1976, began seeking office space. They selected their new location in December, 1976 and signed a lease in early March, 1977.

15. In addition, the defendants retained as their counsel ALAN M. LERNER, Esq., in the late fall or early winter of 1976 to advise them as to their new relationship. ALAN M. LERNER, Esq., is their counsel in this matter.

16. The defendants also sought and obtained a line of credit in the amount of $150,000.00 from the FIRST PENNSYLVANIA BANK. Again, this action was taken prior to leaving and without informing ADLER, BARISH of their intention to leave their employment.

17. As part of the loan application procedure with the FIRST PENNSYLVANIA BANK, the defendants

provided the bank officers with a list of approximately eighty-eight (88) cases with the anticipated legal fees that each case would generate. The legal fees involved amounted to more than $500,000.00 with some cases expected to generate between $25,000.00 and $80,000.00. With the exception of the defendant ARNOLD J. WOLF, none of the defendants could identify by name any of the cases that went into the compilation of the list and this Court finds it totally incredible that an attorney could not recall by name a case that would generate an expected fee of $80,000.00, $65,000.00, $40,000.00 or $25,000.00. Each case that went into the compilation of this list was a case on which the defendants had worked while employees of ADLER, BARISH. None of the defendants had a pecuniary, financial or proprietary interest in any of the cases on this list. The clients whose cases were included on this list were clients of ADLER, BARISH and were not clients of any of the defendants.

18. Prior to his termination, ALAN B. EPSTEIN, received a check of approximately $6,000.00 which represented a referral fee paid by an out-of-state attorney to the ADLER, BARISH firm for a case being handled by Mr. EPSTEIN. Mr. EPSTEIN directed the attorney to make the check payable to him (EPSTEIN), and he then deposited it into his own bank account.

19. Subsequent to the termination of defendant ALAN B. EPSTEIN's employment with ADLER, BARISH, this defendant was permitted, at his request, to remain on the premises of ADLER, BARISH until March 19, 1977. During the period March 10, 1977 until April 4, 1977, Mr. EPSTEIN initiated contacts with clients of ADLER, BARISH, on whose cases he had worked while a salaried employee of ADLER, BARISH, attempting to secure them and their open cases for himself and the new firm. This Court finds as a fact that the actions of ALAN B. EPSTEIN during this period constituted solicitation.

20. ALAN B. EPSTEIN initiated contacts with clients of ADLER, BARISH by telephone and in person. He advised them that he was leaving ADLER, BARISH and further advised them that they could choose to be represented by him, by ADLER, BARISH, or by any other attorney.

21. ALAN B. EPSTEIN followed up these contacts with mailings to clients of ADLER, BARISH, which mailing were form letters that enclosed another form letter discharging ADLER, BARISH from representing that client and that also enclosed a form of contingent fee agreement which named the defendant, ALAN B. EPSTEIN, as the client's attorney. Also enclosed by Mr. EPSTEIN was a self-addressed, stamped return envelope (P-12, A-D). These form letters were typed on ADLER, BARISH equipment by a secretarial employee of ADLER, BARISH.

22. The defendant, ALAN B. EPSTEIN, contacted JAMES PERKINS, an ADLER, BARISH client, after his case had already been settled. He mailed him those items described above as P-12, A-D even though Mr. PERKINS never requested such items to be mailed to him.

23. Defendant, RICHARD A. WEISBORD, ARNOLD J. WOLF and SANFORD I. JABLON were fully aware of the solicitous activities of the defendant, ALAN B. EPSTEIN.

24. On April 1, 1977, in the presence of ARNOLD LEVIN, MARVIN BARISH, SANFORD I. JABLON and RICHARD A. WEISBORD, the defendant, ARNOLD J. WOLF stated that it was his intention to contact ADLER, BARISH clients in order to advise them that he was leaving ADLER, BARISH and to attempt to secure them as his own clients.

25. After leaving the ADLER, BARISH firm, the defendants, RICHARD A. WEISBORD and ARNOLD J. WOLF did in fact contact clients of ADLER, BARISH, advised them that they had left, ADLER,

BARISH and further advised them that they had the right to retain themselves as their attorney and to discharge ADLER, BARISH.

26. The defendants have asserted and continue to assert their intention to contact and communicate with clients of ADLER, BARISH in order to attempt to secure them as their (defendants') clients.

27. The aforementioned and intended activities of the defendants constitute solicitation.

28. The aforementioned and intended actions of the defendants has caused and would cause ADLER, BARISH irreparable harm in that the attorney/client relationship existent between the plaintiff law firm and its clients would be severely undermined.

29. Money damages is an inadequate remedy because the harm and threatened harm cannot be measured in monetary terms; consequently, equitable relief is required.

CONCLUSIONS OF LAW:

1. Plaintiff, the ADLER, BARISH firm, has valid and existing contractual and business relations with more than 1900 clients whom the firm represents as attorneys.

2. Defendant, ALAN B. EPSTEIN, was a salaried employee of ADLER, BARISH from on or about March 1, 1976 until March 10, 1977. As such, he was responsible for handling those cases assigned to him, but those persons who cases he handled were ADLER, BARISH clients and were not his clients.

3. Defendants, RICHARD A. WEISBORD, ARNOLD J. WOLF and SANFORD I. JABLON, were salaried employees of ADLER, BARISH from on or about March 1, 1976 until April 1, 1977. As such, they were responsible for handling those cases assigned to them; but those persons who cases they handled were ADLER, BARISH clients and were not their clients.

4. The defendants have engaged in illegal solicitation in complete violation of and total disregard for the Code of Professional Responsibility.

5. The defendants have attempted, and would continue to attempt, if not enjoined, to induce ADLER, BARISH clients to terminate the contractual and business relationships which exist between the client and their attorney, ADLER, BARISH.

6. The approximately $6,000.00 referral fee properly belonged to ADLER, BARISH and not to the defendant ALAN B. EPSTEIN.

7. The use of ADLER, BARISH equipment and employees to prepare the form letters was illegal.

8. The defendants, by their actions, have tortiously interfered with the contractual and business relations that exist between ADLER, BARISH and its clients.

9. The defendants have illegally utilized confidential information secured while salaried employees of ADLER, BARISH to tortiously interfere with the contractual and business relations that exist between ADLER, BARISH and its clients.

10. Because of the avowed intentions of the defendants to continue their illegal solicitation, there is no adequate remedy at law, consequently, equity shall act to prevent unjustified and tortious interference with the contractual relations that exist between ADLER, BARISH and its clients.

11. The conduct of the defendants has in the past caused and would continue to cause, if not enjoined, irreparable harm to the plaintiff, ADLER, BARISH.

12. The permanent injunction entered by this Court does not in any way infringe on the defendants' Constitutional rights, including their right to freedom of speech.

13. The Final Decree of this Court entered on May 5, 1977, does not in any way prohibit the defendants from professionally and properly engaging in the practice of law.

14. The Constitutional guarantee of freedom of speech does not permit the type of planning and conspiracy evidenced by the defendants who not only conspired to leave ADLER, BARISH, but to take ADLER, BARISH clients with them. Furthermore, the defendants secured counsel to advise them in these matters and said counsel did advise the defendants to act as they did.

15. It is noble and daring to embark on a career of law by cutting the umbilical cord that ties one to an employment contract. But taking the heart and soul of the benefactor is immoral, illegal and repulsive. If they want their own firm, let them get their own clients.

16. The Final Decree of this Court entered on May 5, 1977, permanently enjoining the defendants as set out therein is the proper remedy under the factual circumstances presented to this Court.

SUMMARY AND CONCLUSION:

The activities of the defendants in this matter exhibit a total disregard for the Code of Professional Responsibility which is intended to govern the ethical conduct of attorneys. The defendants advanced the argument throughout the proceedings that their actions were merely intended to apprise ADLER, BARISH clients that they had the right to select the attorney of their choice. They were advising them of a legal right.

"Whether a lawyer acts properly in volunteering advice to a layman . . . depends upon the circumstances . . . The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal right or obligations. Hence, the advice is improper if motivated by a desire to obtain personal benefit . . . Obviously, a lawyer should not contact a non-client,

directly or indirectly, for the purpose of being retained to represent him for compensation." See CANON 2, E C 2-3, Code of Professional Responsibility. Apparently, that which was obvious to the author of the Code was obscure to the defendants in this case.

CANON 2 goes further to state in DR 2-104, that, with certain exceptions, none of which are applicable to the facts presented in this case, "a lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice."

The defendants also attempted to justify their actions by alledging that they did no more than what the ADLER, BARISH partners did when they left F B & L. The analogy is totally without merit. The ADLER, BARISH partners, while not partners in name of F B & L, were partners in fact of that firm, and as such they had a vested, pecuniary, financial, proprietory interest in the case files of that firm, which interest was acknowledged by the subsequent Agreement. The defendants had no such interest in the ADLER, BARISH firm. They were merely employees, and the record is clear that they were well-treated employees in terms of the salaries that were paid them. The actions of the defendants were without merit and foundation.

There also appears to be a very serious question as to the propriety of the long range planning of withdrawing from the firm which has provided employment, with the view of taking those clients (See P 15 list of expectant fees) even before these persons were spoken to about their choice of counsel. Since all of this was done by and with the consent of counsel, the actions of counsel are suspect.

Defendants rely heavily on their Constitutional right of Freedom of Speech. This is a right that must be jealously guarded. But under the cloak of the Constitution, one may not improperly plant the seeds of dissention and distrust for one's own pecuniary interest.

The Legal Profession is and has been a noble calling. A Lawyer stood tall among his peers. He accepted employment with the full understanding of the giving of himself to his firm in the best interests of the client — NOT TO TAKE AWAY the clients from the firm.

If a lawyer chose to enter private practice on his own or form his own firm, he did so without taking or attempting to take with him his employer's clients. True, some of these clients may voluntarily elect to follow the young lawyer, but this was without solicitation.

In the past we were more conscious of our moral obligations. In the interest of expediency and changing times, we have rationalized our beliefs. Consequently, today we must be more outspoken. We must proclaim to all that as lawyers we can govern ourselves, under an ethical Code of Professional Responsibility.

Finally, this Court finds that the outright, counselled, illegal solicitation of clients that was evidenced by the record in this case was not only a complete and total disregard for the provisions of the Code of Professional Responsibility, but was also a violation of those basic ethical concepts which each and every one of us, especially those of us in the legal profession, should possess.

BY THE COURT:

Charles P. Mirarchi, Jr., A. J.

IN THE
COURT OF COMMON PLEAS
OF PHILADELPHIA

ADLER, BARISH, DANIELS, LEVIN AND CRESKOFF, A PARTNERSHIP *Plaintiff*	:	April Term, 1977
vs.	:	
ALAN B. EPSTEIN AND RICHARD A. WEISBORD AND ARNOLD J. WOLF AND SANFORD I. JABLON *Defendants*	:	No. 195 In Equity

FINAL DECREE

CHARLES P. MIRARCHI, JR., A. J.

AND NOW, to wit, this 5th day of May, 1977, it is hereby

ORDERED AND DECREED

that the defendants, ALAN B. EPSTEIN, RICHARD A. WEISBORD, ARNOLD J. WOLF and SANFORD I. JABLON, and all persons acting in concert with them or otherwise participating with them or acting in their aid or behalf, are permanently enjoined and restrained from contacting and/or communicating with those persons who up to and including April 1, 1977, had active legal matters pending with and were represented by

the law firm of ADLER, BARISH, DANIELS, LEVIN and CRESKOFF, except that:

1. Nothing in this Final Decree shall be construed to preclude the defendants from announcing the formation of their new professional relationship in accordance with the requirements of DR 2-102 of the Code of Professional Responsibility.

2. Nothing in this Final Decree shall preclude those persons who, up to and including April 1, 1977, had active legal matters pending with and had been represented by the law firm of ADLER, BARISH, DANIELS, LEVIN and CRESKOFF from voluntarily discharging their present attorney and selecting any of the defendants, or any other attorney, to represent them.

It is further ORDERED and DECREED that the bonds now entered and to be entered shall be dissolved thirty-one (31) days from the date of this Final Decree unless an appeal has been taken.

BY THE COURT:

Charles P. Mirarchi, Jr., A. J.

ADLER, BARISH, DANIELS, LEVIN & CRESKOFF, A PARTNERSHIP *Plaintiff/Appellee*	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	:	
ALAN B. EPSTEIN, RICHARD A. WEISBORD, ARNOLD J. WOLF AND SANFORD I. JABLON, *Defendants/Appellants*	:	No. 1478 October Term, 1977

Appeal from the Final Decree entered May 5, 1977 by the Court of Common Pleas of Philadelphia County, April Term, 1977, Trial Div., No. 195 in Equity.

Opinion by HOFFMAN, J. Filed December 28, 1977

The instant case raises an issue important to the entire legal community. Appellants, salaried associates in appellee firm, notified approximately 400 of appellee's clients on whose cases appellants had worked that appellants were forming a partnership and that the clients were free to terminate their relationship with appellee and to be represented by appellants. Appellants contend that the lower court erred when it enjoined them from " . . . contacting and/or communicating with those persons who up to and including April 1, 1977, had active legal matters pending with and were represented by [appellee]." We agree and would dissolve the injunction entered by the court.

Prior to February 27, 1976, the partners of appellee firm were partners in the law firm of Freedman,

Borowsky and Lorry, ("Freedman, Borowsky," herein) in Philadelphia. Appellants were salaried associates in the same firm. At that time, all of the attorneys involved in this action withdrew from Freedman, Borowsky and commenced practicing law under the name of Adler, Barish, Daniels, Levin & Creskoff. (Appellee to this action; "Adler, Barish," herein). Appellants continued as salaried associates in the new firm. The departing partners transferred 1300 case files from Freedman, Borowsky to Adler, Barish.[1]

During the first year of the new partnership, the partners of appellee opened in excess of 600 new files. The partners assigned appellants to various cases primarily as litigation attorneys. Dissatisfied as associates with Adler, Barish, appellants began developing plans for their own partnership during the fall of 1976.

Prior to severing employment with Adler, Barish, appellants rented office space and obtained a line of credit with First Pennsylvania Bank. In their application for credit, appellants ennumerated as prospective clients numerous clients of Adler, Barish on whose cases appellants were working. After announcing their intention to resign their positions, but before leaving appellee firm, appellants began contacting approximately 400 of appellee's clients. The correspondence included an explanation that appellants were terminating employment with Adler, Barish and a form letter addressed to Adler, Barish, to be signed by the client, discharging Adler, Barish as the client's attorney.[2]

1. Partners of appellee had a combined interest of 44% in the profits of Freedman, Borowsky. That same percentage was preserved by written agreement between appellee and Freedman, Borowsky.

2. At about the same time, appellee was sending the same clients a letter instructing each client that his or her case was being transferred to a different associate because the named appellant was no longer with the firm.

On April 4, 1977, the lower court granted appellee's application for a restraining order against appellants to prevent further contacts with appellee's clients and a rule to show cause why a preliminary injunction should not be issued. On April 11, the court commenced a hearing on appellee's request for a preliminary injunction. Subsequently, appellants asked that the matter be treated as a final hearing. On May 5, within 24 hours of the close of testimony,[3] the lower court entered the following final decree:

"AND NOW, to wit, this 5th day of May, 1977, it is hereby — ORDERED and DECREED — that the defendants, ALAN B. EPSTEIN, RICHARD A. WEISBORD, ARNOLD J. WOLF and SANFORD I. JABLON, and all persons acting in concert with them or otherwise participating with them or acting in their aid or behalf, are permanently enjoined and restrained from contacting and/or communicating with those persons who up to and including April 1, 1977, had active legal matters pending with and were represented by the law firm of ADLER, BARISH, DANIELS, LEVIN and CRESKOFF, except that:

> "1. Nothing in this Final Decree shall be construed to preclude the defendants from announcing the formation of their new professional relationship in accordance with the requirements of DR 2-102 of the Code of Professional Responsibility.
>
> "2. Nothing in this Final Decree shall preclude those persons who, up to and including April 1, 1977, had active legal matters pending with and had been represented by the law firm of ADLER, BARISH, DANIELS, LEVIN and CRESKOFF from voluntarily discharging their present attorney and

3. See Rule 1531(f)(1), Pa.R.C.P.

selecting any of the defendants, or any other attorney, to represent them.

"It is further ORDERED and DECREED that the bonds now entered and to be entered shall be dissolved thirty-one (31) days from the date of this Final Decree unless an appeal has been taken."[4]

The lower court based the decree on its conclusion that appellants' activity amounted to a tortious interference with appellee's business relations. *See* Restatement of Torts, § 766. The lower court also concluded that appellants' correspondence constituted solicitation in contravention of Canon 2 of the Code of Professional Responsibility. Therefore, neither § 767 of the Restatement of Torts nor the First Amendment to the United States Constitution conferred a privilege covering appellants' correspondence. This appeal immediately followed the entry of the lower court's order.

Appellants contend that the lower court erred when it determined that their activities constituted a tortious interference with appellee's business relations as defined by § 766 of the Restatement of Torts. Moreover, appellants assert that their actions did not constitute solicitation within the meaning of the Code of Professional Responsibility. Further, they claim that the First Amendment and a privilege recognized by § 767 of the Restatement of Torts sheltered their acts from injunctive relief. We hold that appellants enjoyed a privilege pursuant to §§ 766 and 767 of the Restatement of Torts to send their correspondence to appellee's clients.[5]

4. As to the appropriateness of injunctive relief, see Comment n, § 766 of the Restatement of Torts, and §§ 933-51 of the Restatement of Torts.

5. Because of this conclusion, we do not determine whether the First Amendment also conferred a privilege upon appellants to communicate with appellee's clients.

Section 766 of the Restatement of Torts provides as follows:

"Except as stated in Section 698, one who, without a privilege to do so, induces or otherwise purposely causes a third person not to

(a) perform a contract with another, or

(b) enter into or continue a business relation with another is liable to the other for the harm caused thereby."[6] Our Supreme Court has interpreted § 766 as follows: "At least since *Lumley v. Gye*, (1853), 2 Ell. & Bl. 216, 1 Eng. Rul. Cas. 706, the common law has recognized an action in tort for an intentional, unprivileged interference with contractual relations. It is generally acknowledged that one has the right to pursue his business relations or employment free from interference on the part of other persons *except where such interference is justified or constitutes an exercise of an absolute right:* Restatement, Torts, § 766." *Birl v. Philadelphia Elec. Co.*, 402 Pa. 297, 300, 167 A.2d 472, 474 (1960). (Emphasis added). *See also, Capecci v. Liberty Corp.*, 406 Pa. 197, 176 A.2d 664 (1962); *Klauder v. Cregar*, 327 Pa. 1, 192 A. 667 (1937).

Even assuming that appellants herein acted "for the purpose of causing [a] specific type of harm," and that absent injunctive relief, "the harm [would] actually result." *Birl v. Philadelphia Elec. Co.*, supra at 301, 167 A.2d at 472, plaintiff must also prove

6. Section 696 of the Restatement deals with marriage contracts. There is no question that the client-attorney relationship comes within the ambit of § 766, whether the fee arrangement is contingent or otherwise. See *Richette v. Pennsylvania Railroad*, 410 Pa. 6, A.2d ___ (1963).

that the alleged tortfeasor is not privileged when he acts contrary to the plaintiff's business interests. *Capecci v. Liberty Corp.*, supra. *Bahleda v. Hankison Corp.*, 228 Pa. Superior Ct. 153, 323 A.2d 121 (1974). The comment to § 766 makes clear that the issue of "privilege" requires us to balance competing interests: "... the importance of the means of inducement relates primarily to the issue of privilege. The predatory means in the early cases, intimidation and fraud, were tortious toward the plaintiff because they were calculated to, and did, affect the conduct of third persons to the plaintiff's damage. But other means may be equally calculated and effective to produce that result; and primarily the plaintiff is concerned with that result rather than with the means by which the third persons were caused to act. The plaintiff's interest in his commercial expectancies must be weighed, however, against the defendant's interest in freedom of action. Where the defendant's conduct is predatory the scale on his side may weigh very lightly, but where his conduct is not predatory it may weigh heavily. The issue is whether in the given circumstances his interest and the social interest in allowing the freedom claimed by him are sufficient to outweigh the harm that his conduct is designed to produce. In deciding this issue, the nature of his conduct is an important factor (see § 767)." Comment (b) at P. 53. *See also, Richette v. Pennsylvania Railroad*, 410 Pa. 6, 187 A.2d 910 (1963).

The lower court concluded that appellants' activity was not privileged by § 767 of the Restatement of Torts because their communications constituted solicitation in violation of Canon 2 of the Code of Professional Responsibility.[7] Initially, we have serious difficulty ac-

7. More specifically, the lower court found that appellants contravened Ethical Consideration 2-3 and Disciplinary Rule 2-104:

"EC 2-3 Whether a lawyer acts properly in volunteering advice to a layman to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. Hence, the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation."

"DR 2-104 Suggestion of Need of Legal Services. (A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice."

Appellee argues in its brief that the conduct was proscribed by DR 2-103: "A lawyer shall not recommend employment . . . of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." We believe that the same analysis applies to DR 2-103 as applies to DR 2-104.

cepting the lower court's conclusion that appellants' conduct amounted to solicitation in a legal sense.[8] Solicitation by attorneys or others in their employ has been condemned as a form of barratry. See 9 C.J.S. Barratry § 2(a). At common law, barratry did "not consist in prompting either private suits or public prosecutions when the sole object is the attainment of public justice or private right, but in the prostitution of these remedies to mean and selfish purposes; and, under some statutes, there must be 'a corrupt or malicious intent to vex and annoy.' Inducing others to commence just suits is barratrous if done with a ruinous or oppressive motive." 9 C.J.S. Barratry § 2(a) (citations omitted). The essence of criminal barratry is the bringing of "unjust and vexatious suits." The Crimes Code, Act of De-

8. The lower court concluded that appellants' letter constituted solicitation in violation of the Code of Professional Responsibility. In reviewing the lower court's conclusion of law, we must look to the specific meaning of solicitation under the Code of Professional Responsibility and relevant caselaw, instead of dictionary definition of solicitation.

cember 6, 1972, P.L. 1482, No. 334, § 1; 18 Pa. C.S. § 5109. As noted by our Supreme Court, the Code of Professional Responsibility seeks ". . . to eliminate the active recruitment of clients and stirring up of litigation by or on behalf of attorneys." *In re Berland*, 458 Pa. 439, 443, 328 A.2d 471, 474 (1974). *See also In re Shigon*, 462 Pa. 1, 329 A.2d 235 (1974); *In re Salus*, 321 Pa. 103, 184 A.69 (1936); *In re Disbarment Proceedings*, 321 Pa. 81, 184 A.59 (1936); *Klensin v. Board of Governance of the Pa. Bar*, 312 Pa. 564, 168 A. 474 (1933). The common thread in cases involving the issue of solicitation is fomenting litigation or other legal action when none was contemplated by the client. The instant case is readily distinguishable. Appellants contacted only clients who had already sought legal services. They did not attempt to create lawsuits or controversy or to encourage an addditional amount of legal work on behalf of those clients whom they contacted.

The lower court erred for a second reason. Even if appellants' conduct did amount to solicitation, the instant proceeding is not a disciplinary one in which that conclusion would be dispositive.[9] A finding of "solicitation" does not foreclose the possibility that the conduct is nonetheless privileged.[10] Rather that conclude that "solicitation" is *per se* unprivileged, we

9. Appellants argue that the lower court did not even have jurisdiction to hear a claim involving an alleged violation of the Code, because the disciplinary board has exclusive jurisdiction. We do not reach that issue. But see In re *Shigon*, supra.

10. As noted by the Supreme Court in a similar context, [w]e meet at the outset the contention that 'solicitation' is wholly outside the area of freedom protected by the First Amendment. To this contention there are two answers. The first is that a State cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects. . . ." *NAACP v. Button*, 371 U.S. 415, 429 (1963).

must determine whether appellants' activity was permissible by reference to § 767 of the Restatement.

Section 767 provides as follows:

> "In determining whether there is a privilege to act in the manner stated in § 766, the following are important factors:
>
> "(a) the nature of the actor's conduct,
> "(b) the nature of the expectancy with which his conduct interferes,
> "(c) the relations between the parties,
> "(d) the interest sought to be advanced by the actor and
> "(e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand."

We will discuss each subsection of 767 seriatim.

(a) Although the lower court found that appellants' conduct was solicitation, we believe that term of opprobrium does not apply in the instant case. First, the communication was not false, misleading, or coercive. Cf. *Richette v. Pennsylvania Railroad*, supra. Our profession may have once viewed communication by a lawyer of certain kinds of information as unseemly. The United States Supreme Court has recently held that the traditional blanket suppression of lawyer advertising violates the First Amendment and prevents the free flow of useful information to consumers of legal services. *Bates v. State Bar of Arizona*, 433 U.S. 350, 45 LW 4895 (June 27, 1977). *Bates* is not dispositive because it dealt specifically with advertising and with a direct disciplinary proceeding. While appellants' conduct was technically not advertising, *Bates* does indicate that a tension exists between traditional ethical considerations and the First Amendment guarantee of free flow of information, commercial or other-

wise. Thus, an analysis of the nature of the actor's conduct does not answer the question of whether appellants' conduct was privileged.

(b) The appellants' action interfered with the expectation of the members of appellee that they would receive whatever fee would be owing as a result of the representation of their clients. As noted by the Pennsylvania Supreme Court (per Justice MUSMANNO) in *Richette v. Pennsylvania Railroad*, supra at 9, 187 A.2d at 912: "A claimant or patient may, of course, disengage himself from a professional relationship provided he has met all obligations owing to his legal or medical counsellor, but if that disassociation is the result of coercion or misrepresentation practiced by others, the intervenors are answerable in law as anyone else would be liable for causing the rupture of a binding contract." Obviously, appellee is entitled to payment of any fees already earned, either pursuant to contract or in quantum meruit.[11] The issue is not a factual one — that is, it is not a question of what the partners of appellee actually expected; it is a question of what the law deems reasonable. Because the law permits a client to seek and re-seek counsel of his choice, any expectation that a client would remain constant throughout the course of litigation is unrealistic.

(c) Appellee asserts that ". . . the basic impropriety of the solicitation of clients is compounded by the fact that the defendants acquired their knowledge of the cases of these clients from confidential information, supplied to them in the course of their employment. An associate attorney seems the prototype of a confidential employee, . . ." Appellee's argument is wide of the mark. Even the lower court's order allows the appellants to announce "the formation of their new professional relationship in accordance with the requirements of DR 2-102 . . . ." The only confidential information which appellants attempted to use was the names of the various clients; they certainly did not attempt to breach the attorney-client privilege by revealing to other parties information about ongoing cases. Further, appellee did not attempt to protect the interest now asserted by contractual agreement with appellants.

11. Partners of appellee who had just severed ties with Freedman, Borowsky cannot seriously claim that an expectation grounded on the stability of the firm structure is entirely realistic.

(d) Obviously, in part, appellants seek to advance their own financial well-being. However, appellants' communications may also advance the interests of appellee's clients. Many of the clients have dealt personally both with partners in Adler, Barish and the associate to whom the case was assigned. In some instances, the associate may have developed the client's trust and faith in his professional competence, despite the fact that the partner may have procured the client's business. Having one's file transferred to a new associate, as proposed in appellee's letter to its clients, will undoubtedly engender additional cost and time to the client. That may well be contrary to the client's best interest. *See* Code of Professional Responsibility, EC 7-8 (requiring a lawyer to ". . . exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations . . .") and EC 7-9 (requiring counsel to ". . . act in a manner consistent with the best interests of his client.") Transfer may also necessitate delays in scheduling court appointments. *See* Code of Professional Responsibility, EC 7-19 et seq. on an attorney's duty to the court system in general. The breadth of the lower court's order prevents meaningful contact between appellants and those clients who have a significant interest in expeditious handling of their case by the attorney of their choice.

(e) If the foregoing analysis is correct, the social interest in protecting appellee's expectation is not in-

surmountable. We must also consider "the social interests in protecting . . . the actor's freedom of action . . . ." We have already noted that allowing appellants to contact appellee's clients may further significant interests of the clients. That policy is closely analogous to the Supreme Court's reasoning in *Bates:*

> ". . . a consideration of competing interests reinforce our view that such speech should not be withdrawn from protection merely because it proposed a mundane commercial transaction. Even though the speaker's interest is largely economic, the Court has protected such speech in certain contexts. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Thornhill v. Alabama*, 310 U.S. 88 (1940). The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. See *Bigelow v. Virginia*, supra. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603-604 (1967) (Harlan, J. concurring). In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking. 425 U.S. at 761-765." U.S. at ___, (45 LW at 4799).

Moreover, in balancing the social interests in protecting appellee's expectancy of uninterrupted business relations and appellants' freedom of action pursuant to § 767(e), it is appropriate to note that the lower court could have adequately protected appellee's

legitimate expectations by employing a narrow remedy than blanket suppression.[12] For example, the lower court could have protected appellee's legitimate business interests by enjoining overreaching practices. *Bates v. State Bar of Arizona*, supra, predatory business practices, Comment to § 766, or false or misleading statements about the quality of the services to be provided. *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817 (1976).

Balancing the competing interests delineated by § 767 of the Restatement of Torts, we believe that the value of free interchange of commercial information endorsed in *Bates* and asserted by appellants must prevail. Accordingly, we hold that appellants' conduct was privileged under §§ 766 and 767 of the Restatement of Torts. We dissolve the injunction and dismiss appellee's complaint in equity.

Injunction dissolved and complaint in equity dismissed.

SPAETH, J. files a concurring opinion.

WATKINS, P.J., and PRICE and VAN DER VOORT, JJ. dissent.

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12. With one insignificant exception, the lower court enjoined all contact with appellee's clients. The court's order allowed appellants to announce the formation of their new professional relationship in accordance with the requirements of DR 2-102(2) of the Code of Professional Responsibility. However, DR 2-102(2) limits the mailing of announcement cards to lawyers, clients, former clients, personal friends and relatives. The lower court made a specific finding that the persons contacted by appellants were clients of appellee firm rather than the individual appellants. Accordingly, DR 2-102(2) would not permit appellants to send announcement cards to the persons they sought to contact. Therefore, the one exception is meaningless.

IN THE
SUPERIOR COURT OF
PENNSYLVANIA

ADLER, BARISH, DANIELS	:	
LEVIN & CRESKOFF,	:	
A PARTNERSHIP	:	
Plaintiff/Appellee	:	
vs.	:	Philadelphia District
ALAN B. EPSTEIN,	:	
RICHARD A. WEISBORD,	:	
ARNOLD J. WOLF	:	
AND SANFORD I. JABLON,	:	No. 1478
Defendant/Appellants	:	October Term 1977

Appeal from the Final Decree of the Court of Common Pleas of Philadelphia, entered May 5, 1977. Trial Div., Equity, No. 195 April Term, 1977

Concurring Opinion By

SPAETH, J.: Filed December 28, 1977

This is an equity case. On May 5, 1977, the lower court enjoined appellants "from contacting and/or communicating with those persons who up to and including April 1, 1977, had active legal matters pending with and were represented by [appellees'] law firm. . . ." The court qualified this order by noting that it was not to be construed "to preclude [appellants] from announcing the formation of their new professional rela-

tionship," or "to preclude those persons [who had been represented by appellees' firm] from voluntarily discharging their present attorney and soliciting any of [appellants]. . . ."

The basis for this order appears from the lower court's opinion, which may be summarized as follows. Appellants were "merely employees" of appellees' firm. Opinion of lower court at 12. The persons on whose cases appellants were working were therefore not appellants' clients but the firm's. *Id.* at 9, 11. Appellants therefore had no right to write those clients that appellants were forming their own firm, and that the clients had the right to choose to be represented by appellants, or by appellees or any other attorney. Appellants' letter to this effect represented "illegal solicitation in complete violation of and total disregard for the Code of Professional Responsibility" *Id.* at 9. Accordingly, the letters were a "tortious [ ] interfer[ence] with the contractual and business relations that exist between [appellee's firm] and its clients." *Id.* at 10.

> It is noble and daring to embark on a career of law by cutting the umbilical cord that ties one to an employment contract. But taking the heart and soul of the benefactor is immoral, illegal and repulsive. If they want their own firm, let them get their own clients.
>
> *Id.* at 11.

Judge HOFFMAN's opinion suggests two, alternative, reasons in support of his conclusion that the order of the lower court must be vacated: First, that appellants' conduct did not amount to solicitation, Slip Opinion at 7-8; and second, that even if it did, it was privileged under Sections 766 and 767 of the Restatement of Torts, *id.* at 8-13.

-1-

The order of the lower court should be vacated, but I do not think the decision should rest either upon the Code of Professional Responsibility or upon the law of business relations. Instead I think it should rest on appellants' First Amendment rights as defined by the United States Supreme Court in its recent decision in *Bates v. State Bar of Arizona*, 45 U.S.L.W. 4895 (1977).[1]

-2-

The facts in *Bates* were as follows. The appellants were two attorneys who were members of the Arizona State Bar. The Arizona Supreme Court had adopted a disciplinary rule that prohibited members of the Bar from advertising in a newspaper. The appellants nevertheless did advertise; their advertisement said that their "legal clinic" offered "legal services at very reasonable fees", and listed their fees for uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name. The State Bar's President filed a complaint against appellants. After various proceedings pursuant to the complaint the Board of Governors of the State Bar recommended that each appellant be suspended from the practice of law for one week. Appellants appealed to the Arizona Supreme Court. They admitted violating the disciplinary

1. In fairness to the lower court it should be noted that *Bates* was filed on June 27, 1977, almost two months after the lower court's order. Judge HOFFMAN's opinion suggests in footnote 5, that the constitutional issue need not be considered because of his conclusion that appellants' conduct was privileged as a matter of the law of torts. However, *Bates* has changed the law of tortious interference with business relations (as well as the law under the Code of Professional Responsibility). Therefore, to define appellants' rights it is essential to consider the impact of *Bates*. *See* discussion *infra*.

rule prohibiting advertising but argued, among other matters, that the rule infringed their First Amendment rights. A plurality of the Arizona Supreme Court rejected this argument, and held the rule valid (although the court reduced the sanction to censure only because it found that appellants had acted in good faith). On further appeal the United States Supreme Court reversed this holding, concluding that the rule violated appellants' First Amendment rights.

To be sure, *Bates* is distinguishable from the present case on the facts. In *Bates* the solicitation was of the public; here it was of clients of appellees' firm.[2] This factual difference, however, is of no legal significance; if anything, it makes this case a clearer one than was *Bates*. The correctness of this conclusion becomes apparent as one examines the reasoning of the Court in *Bates*.[3]

-a-

First the Court in *Bates* recognized its earlier decisions holding that the First Amendment protects "commercial speech", which may be defined as speech that "propose[s] a mundane commercial transaction", and where "the speaker's interest is largely economic." 45 U.S.L.W. at 4899. This is because:

> The listener's interest is substantial: the consumer's concern for the free flow of commercial

2. I disagree with Judge HOFFMAN that there was no solicitation. There was no solicitation in the sense of barratry, nor any that involved either fomenting litigation or the sort of conduct described in Klensis v. Bd. of Gov. of Pa. Bar., 312 Pa. 564, 168 A. 474 (1933). These are not the only kinds of solicitation, however. "Solicitation" means "to solicit", and one meaning of "to solicit" is "to seek eagerly or actively". Webster's Third New International Dictionary 2169 (1965). By writing the clients of appellees' firm, appellants "eagerly or actively" sought their business.

3. BLACKMAN, J., delivered the opinion of the Court; BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined him. The other Justices filed, among them, two opinions concurring in part and dissenting in part, and one opinion dissenting in part.

> speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. . . . And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system.
>
> *Id.* at 4899 (citations omitted).

It was clear in *Bates* that the appellants' advertisements were commercial speech; it was also clear that the disciplinary rule "serve[d] to inhibit the flow of commercial information and to keep the public in ignorance." *Id.* Therefore, the Court concluded, the question was whether there was any justification for prohibiting the appellants to advertise.

This question is precisely the question here. Appellants' letters were a form of commercial speech. The fact that they were addressed to specific individuals rather than to the public generally in no way affects this conclusion. Appellants' interest in sending the letters was "largely economic"; and the letters "proposed a mundane commercial transaction."

-b-

Next the Court in *Bates* examined in turn each of a number of justifications for prohibiting the appellants to advertise. It is unnecessary to refer to all of these; three were the most important. These three were: That advertising would have an adverse effect on professionalism; that any advertising would be inherently misleading; and that advertising would have an adverse effect on the administration of justice. The Court rejected these justifications, reasoning as follows: It

used to be that law was regarded by lawyers as a form of public service and "above" trade. This attitude discouraged advertising as unethical. Today, however, we recognize that lawyers are not "above" trade; like many others, they earn living by charging for their services. Nor do we regard it as necessarily undignified for professions to advertise; other professions, such as bankers and engineers, advertise and are not regarded as undignified. Moreover, because lawyers do not advertise, many persons do not obtain a lawyer, even when they know they need one, either because they are afraid of the cost or because they can not find a competent lawyer. It is true that advertising might be misleading, but it need not be; it depends upon the sort of legal services advertised, and upon what is said. It is also true that advertising might increase use of the judicial machinery, but that is not the same as saying that it would have an adverse effect on the administration of justice. To the contrary: At present the middle 70% of the public is not adequately served by the legal profession. It would be better if these persons were adequately served, even if that meant more law suits. Advertising can help to ensure that they will be adequately served. It is appropriate that advertising should be resorted to for this purpose, for it is "the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange." 45 U.S.L.W. at 4902. Consequently, "[a] rule allowing restrained advertising would be in accord with the bar's obligation to 'facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.' " *Id.* (quoting from the Code of Professional Responsibility).

This reasoning is dispositive here. It is true that appellees' clients already had, and therefore did not need to seek, a lawyer, specifically, appellees. That fact is of no significance, however. The advertisement upheld in *Bates* would be read by *two* different classes

of persons: those who had no lawyer, and those who (as was true of appellees' clients) did have a lawyer. The essence of the Court's reasoning is that persons in *both* of these classes have a right to learn, through advertising, that a given lawyer offers given legal services at a given price. If as a result a person already represented decides to change, and to retain the lawyer identified in the advertisement, so be it.

-c-

Finally, the Court in *Bates* noted a number of qualifications to its conclusion that the First Amendment protected "restrained advertising." Thus it noted that it did not have to consider advertising that included a claim relating to the quality, as distinguished from the availability and price, of legal services. 45 U.S.L.W. at 4899. Also, that it did not have to consider a claim that the advertising in question was deceptive, or misleading, or false, or extravagant. *Id.* Also, that it did not have to "resolve the problems associated with in-person solicitation of clients — at the hospital room or the accident site, or in any other situation that breeds undue influence. . . ." *Id.*

The same may be said here. There is no finding that appellants' letters were in any way inaccurate, or that appellants engaged in any conduct that could be characterized as undue influence. The lower court does in one of its findings (No. 18) find that one of the appellants, Alan B. Epstein, deposited to his account "a referral fee paid by an out-of-state attorney to [appellees'] firm for a case being handled by Mr. EPSTEIN." We cannot tell from the record whether this conduct, or other conduct by other of appellants, would support a claim by appellees in quasi contract or quantum meruit. We may assume for sake of discussion that appellees do have, and will be able to recover on, a quasi contract or quantum meruit claim against some or all

of appellants. That fact is no justification for enjoining appellants from exercising their First Amendment right of commercial speech. Because appellants' First Amendment rights have been violated I concur in the conclusion reached by Judge HOFFMAN that the order must be vacated.

SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

ADLER, BARISH, DANIELS, LEVIN AND CRESKOFF, A PARTNERSHIP	:	No. 1478 October Term, 1977
vs.	:	
ALAN B. EPSTEIN, AND RICHARD A. WEISBORD, AND ARNOLD J. WOLF, AND SANFORD I. JABLON	:	
Appellants	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the INJUNCTION IS DISSOLVED AND COMPLAINT IN EQUITY DISMISSED.

BY THE COURT:

Prothonotary

Dated: December 28, 1977

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ADLER, BARISH, DANIELS, LEVIN AND CRESKOFF, A PARTNERSHIP	:	No. 73 January Term, 1978
Appellant	:	Appeal from the Order of the Superior Court, No. 1478 October Term, 1977, reversing the Decree of the Court of Common Pleas of Philadelphia, No. 195 April Term, 1977.
vs.	:	
ALAN B. EPSTEIN, RICHARD A. WEISBORD, ARNOLD J. WOLF, AND SANFORD I. JABLON	:	

OPINION OF THE COURT

ROBERTS, J. Filed October 5, 1978

Appellant, the law firm of Adler, Barish, Daniels, Levin and Creskoff, filed a Complaint in Equity in the Court of Common Pleas of Philadelphia. It sought to enjoin appellees,[1] former associates of Adler Barish, from interfering with existing contractual relationships between Adler Barish and its clients. The court of common pleas entered a final decree granting the requested relief, but a divided Superior Court dissolved the injunction and dismissed Adler Barish's complaint. We granted allowance of appeal. We now reverse and direct reinstatement of the decree of the court of common pleas.[2]

1. Appellees include Alan Epstein, Richard Weisbord, Arnold Wolf, and Sanford Jablon.

2. We hear this appeal pursuant to the Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P.L. 673, art. II, § 204(a), 17 P.S. § 211.204(a) (Supp. 1978).

I. Background

From the formation of Adler Barish in February, 1976, through March of the next year, appellees were salaried associates of Adler Barish.[3] Appellees were under the supervision of Adler Barish partners, who directed appellees' work on cases which clients brought to the firm.[4]

While still working for Adler Barish, appellees decided to form their own law firm and took several steps toward achieving their goal. They retained counsel to advise them concerning their business venture, sought and found office space, and early in March, 1977, signed a lease.

Shortly before leaving Adler Barish, appellees procured a line of $150,000 from First Pennsylvania Bank.

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3. In establishing Adler Barish, its partners brought with them approximately 1300 cases from their old law firm, Freedman, Borowsky and Lorry, in which they shared approximately half the profits, losses, and assets. The two firms later signed a writing whose terms gave Adler Barish custody and control over the 1300 files transferred, and preserve the financial interest partners of Adler Barish had before leaving the Freedman firm. Clients whose files were transferred became clients of Adler Barish. From March, 1976 to April, 1977, Adler Barish opened over six hundred new case files.

Appellees were salaried employees of the Freedman firm at the time Adler Barish was formed. Appellees left Freedman and went to work for Adler Barish.

We take our statement of facts from the findings of fact of the court of common pleas, sitting in equity. Neither party has challenged these findings, and the Superior Court did not disturb them. We accord the findings the weight of a jury verdict. *Garges Estate*, 474 Pa. 237, 378 A.2d 307 (1977); *Kay v. Kay*, 460 Pa. 680, 334 A.2d 585 (1975).

4. Avram Adler, partner of Adler Barish, testified that each new client gave Adler Barish a power of attorney and signed a contingent fee agreement comporting with Rule 202 of the Philadelphia Rules of Civil Procedure. Appellees do not dispute this testimony; indeed, the court of common pleas concluded that these agreements were "valid and existing."

As security, appellees furnished bank officials with a list of eighty-eight cases and their anticipated legal fees, several of which were higher than $25,000, and together exceeded $500,000. No case on the list, however, was appellees'. Rather, each case was an Adler Barish case on which appellees were working.

Appellee Alan Epstein's employment relationship with Adler Barish terminated on March 10, 1977.[5] At his request, Epstein continued to use offices of Adler Barish until March 19. During this time, and through April 4, when Adler Barish filed its complaint, Epstein was engaged in an active campaign to procure business for his new law firm. He initiated contacts, by phone and in person, with clients of Adler Barish with open cases on which he had worked while a salaried employee Epstein advised the Adler Barish clients that he was leaving the firm and that they could choose to be represented by him, Adler Barish, or any other firm or attorney.

Epstein's attempt to procure business on behalf of the firm did not stop with these contacts. He mailed to the clients form letters which could be used to discharge Adler Barish as counsel, name Epstein the client's new counsel and create a contingent fee agreement.[6] Epstein also provided clients with a stamped envelope addressed to Epstein. Appellees Richard Weisbord, Arnold Wolf, and Sanford Jablon, who left Adler Barish on April 1, 1977, were aware of Epstein's efforts to procure this business on behalf of

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5. The firm received documents relating to cases for which it apparently had no file. Contrary to the firm's procedure, Epstein personally maintained files for some cases. Likewise, Epstein did not adhere to Adler Barish policy concerning certain fees. Adler Barish obtained a case which was assigned to Epstein. He sent the file to an out-of-state attorney for further handling. Instead of turning over the forwarding fee to the firm, Epstein kept it for himself. It appears that these events led to termination of Epstein's employment.

6. See Appendix.

their new firm and did not attempt to curtail them. Indeed, Weisbord and Wolf, upon leaving Adler Barish, also immediately began to seek business, as did Epstein, for the new firm. They too informed clients of Adler Barish of their plans and that the clients were free to discharge Adler Barish and retain Weisbord and Wolf in its stead. Their efforts continued until Adler Barish filed its complaint.

Thus, clients of Adler Barish served a dual purpose in appellees' effort to start their own law firm. First, while appellees still worked for Adler Barish, Adler Barish cases formed the basis for appellees' obtaining bank credit. Then, appellees, as they left Adler Barish, made a concentrated attempt to procure the cases which had been used to obtain credit.

On April 4, the court of common pleas granted Adler Barish preliminary relief, enjoining appellees' campaign to obtain the business of Adler Barish clients.[7] One month later, on May 5, the court entered its final decree, which provided:

> "[T]he defendants, ALAN B. EPSTEIN, RICHARD A. WEISBORD, ARNOLD J. WOLF and SANFORD I. JABLON, and all persons acting in concert with them or otherwise participating with them or acting in their aid or behalf, are permanently enjoined and restrained from contacting and/or communicating with those persons who up to and including April 1, 1977, had active legal matters pending with and were represented by the law firm of ADLER, BARISH, DANIELS, LEVIN and CRESKOFF, except that:

7. The same day, the court granted a rule on appellees to show cause why a preliminary injunction should not issue. On April 11, the court began to hear testimony. The court had fixed April 7 as the date for a hearing on the rule but, because of a conflict in the schedule of appellees' counsel, rescheduled the hearing for April 11. At the request of appellees, the court treated the proceedings as a final hearing.

> 1. Nothing in this Final Decree shall be construed to preclude the defendants from announcing the formation of their new professional relationship in accordance with the requirements of DR 2-102 of the Code of Professional Responsibility.
>
> 2. Nothing in this Final Decree shall preclude those persons who, up to and including April 1, 1977, had active legal matters pending with and had been represented by the law firm of ADLER, BARISH, DANIELS, LEVIN and CRESKOFF from voluntarily discharging their present attorney and selecting any of the defendants, or any other attorney, to represent them."

The court concluded that appellees "engaged in illegal solicitation in complete and total disregard for the Code of Professional Responsibility" and thereby "tortiously interfered with the contractual and business relations that exist between Adler Barish and its clients." It found equitable relief appropriate in view of appellees' "avowed intentions . . . to continue their illegal solicitation."

Appellees appealed to the Superior Court,[8] which reversed. In addition to granting Adler Barish's petition for allowance of appeal, we granted a stay and expedited argument.

II. Appellees' Constitutional Claim

The facts found by the court of common pleas, which appellees do not dispute and the Superior Court did not disturb, demonstrate that, while leaving Adler Barish, appellees made numerous contacts with Adler

8. On May 18, 1977, the Superior Court denied appellees' petition to stay the proceedings, "provided that an appeal bond in the sum of $200,000 is posted by [Adler Barish] by May 20, 1977," and advanced argument to June, 1977. The $200,000 appeal bond was twice the bond the court of common pleas fixed.

Barish clients on whose active cases appellees were working before leaving Adler Barish. Adler Barish argues that appellees' conduct constitutes an intentional interference with existing contractual relationships between Adler Barish and its clients. According to Adler Barish, appellees' conduct is "deserving of censure, not encouragement." Appellees, on the other hand, contend that their conduct was "privileged and that therefore no right of action for intentional interference lies. Moreover, they argue that their conduct is protected under the first and fourteenth amendments to the Constitution of the United States.

"[S]peech which does 'no more than propose a commercial transaction' " is no longer outside the protection of the first and fourteenth amendments to the Constitution of the United States. *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748, 762, 96 S. Ct. 1817, 1825 (1976) (striking down state statute deeming licensed pharmacists' advertising of prescription drugs "unprofessional conduct"); see *Pennsylvania State Board of Pharmacy v. Pastor,* 441 Pa. 186, 272 A.2d 487 (1971) (invalidating Pennsylvania statute prohibiting advertising of "dangerous drugs" dispensible only with a physician's prescription). Accordingly, states are barred from imposing blanket prohibitions against truthful advertising of "routine" legal services. *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S. Ct. 2691 (1977). Such a blanket prohibition "serves to inhibit the free flow of commercial information and to keep the public in ignorance." Id., 433 U.S. at 365, 97 S.Ct. at 2700.

Nothing in the challenged decree prohibited appellees from engaging in the truthful advertising protected under *Bates.* Appellees could inform the general public, including clients of Adler Barish, of the availability of their legal services, and thus the "free flow of commercial information" to the public is unimpaired. Moreover, the injunction expressly permitted appellees

to announce "formation of their new professional relationship in accordance with the requirements of DR 2-102 of the Code of Professional Responsibility." Appellees therefore were permitted to mail announcements to "lawyers, clients, former clients, personal friends, and relatives." Code of Professional Responsibility, DR 2-102(A)(2). This would include the very clients of Adler Barish whose business appellees sought. See Committee on Professional Ethics of the American Bar Association, Informal Decision No. 681 (August 1, 1963) (permitting departing attorney to send announcements " to those clients of the old firm for whom he had worked").

What the injunction did proscribe was appellees' "contacting and/or communicating with those persons who up to and including April 1, 1977, had active legal matters pending with and were represented by the law firm of ADLER, BARISH, DANIELS, LEVIN and CRESKOFF." Our task is to decide whether the conduct of appellees is constitutionally subject to sanction.[9]

The Code of Professional Responsibility, DR 2-103(A) (as adopted, 1974), provides:

> "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer."

See also Code of Professional Responsibility, DR 2-104(A). Appellees clearly violated this "proscription against self-recommendation." *Berlant Appeal,* 458 Pa. 439, 443, 328 A.2d 471, 474 (1974), cert. denied 421 U.S. 964, 95 S.Ct. 1953 (1975). They recommended their own employment, even though clients of

9. Appellees have not disputed the constitutionality of an injunction as a form of sanction; rather, they argue that no sanction may, constitutionally, be imposed.

Adler Barish did not seek appellees' advice "regarding employment of a lawyer."

Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912 (1978), makes plain that, after *Bates*, states may constitutionally impose sanctions upon attorneys engaging in conduct which violates these disciplinary rules, even though the conduct involves "commercial speech." In *Ohralik*, the state bar association suspended an attorney who "solicited" persons injured in an automobile accident by making visits to the hospital room where the persons were recovering. Mr. Justice Powell, speaking for the Court, emphasized that commercial speech does not enjoy the same constitutional protections traditionally afforded other forms of speech:

> "In rejecting the notion that such speech 'is wholly outside the protection of the First Amendment,' *Virginia Pharmacy*, 425 U.S., at 761, 96 S. Ct. at 1825, we were careful not to hold 'that it is wholly undifferentiable from other forms' of speech. Id., at 771 n.24, 96 S.Ct. at 1830. We have not discarded the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. Ibid. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.
>
> * * *

> "Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 883 (CA2 1968), cert. denied, 394 U.S. 976, 89 S.Ct. 1454, 22 L.Ed.2d 756 (1969), corporate proxy statements, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co. v. United States*, 257 U.S. 377, 42 S.Ct. 114, 66 L.Ed. 284 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618, 89 S.Ct. 1918, 1942, 23 L.Ed2d 547 (1969). See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61-62, 93 S.Ct. 2628, 2637, 37 L.ed.2d 446 (1973). Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation."

Id., 436 U.S. at 455-456, 98 S.Ct. at 1918-19 (footnote omitted). In rejecting the attorney's constitutional claim, the Court determined that the state's interests were important enough to support regulation of the attorney's conduct:

> "As applied in this case, the disciplinary rules are said to have limited the communication of two kinds of information. First, appellant's solicitation imparted to Carol McClintock and Wanda Lou Holbert certain information about his availability and the terms of his proposed legal services. In this respect, in-person solicitation serves much the same

function as the advertisement at issue in *Bates*. But there are significant differences as well. Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual. The admonition that 'the fitting remedy for evil counsels is good ones' is of little value when the circumstances provide no opportunity for any remedy at all. In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the 'availability, nature, and prices' of legal services, cf. *Bates*, supra, 433 U.S. at 364, 97 S.Ct. at 2699, it actually may disserve the individual and societal interest, identified in *Bates*, in facilitating 'informed and reliable decisionmaking.' Ibid."

Id., 436 U.S. at 457, 98 S.Ct. at 1919 (footnotes omitted).

Just as in *Ohralik*, appellees' conduct frustrates, rather than advances, Adler Barish clients' "informed and reliable decisionmaking." After making Adler Barish clients expressly aware that appellees' new firm was interested in procuring their active cases, Epstein provided the clients the forms that would sever one attorney-client relationship and create another. Epstein's aim was to encourage speedy, simple action by the client. All the client needed to do was to "sign on

the dotted line" and mail the forms in the self-addressed, stamped envelopes. Other appellees condoned Epstein's conduct on behalf of appellees' new firm. Indeed, upon their departure, appellees Weisbord and Wolf informed Adler Barish clients that they could discharge Adler Barish and retain appellees.[10]

Thus, appellees were actively attempting to induce the clients to change law firms in the middle of their active cases. Appellees' concern for their line of credit and the success of their new law firm gave them an immediate, personally created financial interest in the clients' decisions. In this atmosphere, appellees' contacts posed too great a risk that clients would not have the opportunity to make a careful, informed decision. Compare Code of Professional Responsibility, EC 2-11 (directing that standards for attorney advertising "facilitate informed selection of lawyers by potential consumers of legal services"). "[T]o reduce the likelihood of overreaching and the exertion of undue influence on lay persons; to protect the privacy of individuals; and to avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest," *Ohralik v. Ohio State Bar Association*, 436 U.S. at 461, 98 S.Ct. at 1921, we must reject appellees' argument and conclude that, just as in *Ohralik*, the Constitution permits regulation of their conduct.[11]

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10. Appellees' contacts pose consequences more serious than mailing of announcements in conformity with DR 2-102 and as allowed by the decree of the court of common pleas. Appellees' contacts make express their interest in Adler Barish clients' cases, while announcements, at most, only suggest the same. Moreover, appellees' form letters and self-addressed envelopes, unlike announcements, provide appellees a means of benefitting from a clients' immediate, perhaps ill-considered, response to the circumstances.

11. We also recognize that *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893 (1978), forbids governmental sanctioning of an attorney who, in pursuit of ideological goals, advises a prospective client of

III. The Right of Action

Thus, we turn to whether the court of common pleas properly concluded that Adler Barish is entitled to relief. In *Birl v. Philadelphia Electric Co.*, 402 Pa. 297, 167 A.2d 472 (1961), this Court adopted Section 766 of Restatement of Torts and its definition of the right of action for intentional interference with existing contractual relations.[12] There, we stated:

> "At least since *Lumley v. Gye* (1853), 2 Ell. & Bl. 216, 1 Eng. Rul. Cas. 706, the common law has

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Note 11—*Continued*
legal rights and offers the free legal assistance of a nonprofit organization of which the attorney is a member. But appellees' goals were vastly different. Appellees were interested not in any particular client or the specific issues the cases they sought might raise, but rather their own financial gain.

12. Two earlier cases cited Restatement of Torts, § 766, with approval. *Bloom v. Devonian Gas & Oil Co.*, 397 Pa. 309, 155 A.2d 195 (1959); *Bright v. Pittsburgh Musical Society*, 379 Pa. 335, 108 A.2d 810 (1954).

This Court had long recognized a right of action for interference with existing contractual relations. For example, in *Vanarsdale v. Laverty*, 69 Pa. 103 (1871), we affirmed a judgment against citizens of a community who, without justification, petitioned their school board to terminate the employment of the plaintiff, a school teacher. "A groundless petition instigated only by malice cannot surely be the right of any citizen where it actually results in harm to the object of its malicious purpose." 69 Pa. at 109. In *Caskie v. Philadelphia Rapid Transit Co.*, 321 Pa. 157, 184 A. 17 (1936), we found sufficient to state a cause of action plaintiff 's allegations that the defendant misrepresented to the party with whom plaintiff had contracted that the party did not have to pay plaintiff for services performed. And, in *Dora v. Dora*, 392 Pa. 433, 141 A.2d 587 (1958), we upheld plaintiffs' right of action where the defendant bank, upon the misrepresentations of other defendants, improperly paid over funds to which plaintiffs, pursuant to a settlement agreement, were entitled. " '[I]t is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference;' . . . intentional doing of the wrongful act without legal justification [is] all that [is] necessary [to state a cause of action]." 392 Pa. at 433, 141 A.2d at 590 (quoting *Klauder v. Cregar*, 327 Pa. 1, 7, 192 A 667, 670 (1937)).

> recognized an action in tort for an intentional, unprivileged interference with contractual relations. It is generally recognized that one has the right to pursue his business relations or employment free from interference on the part of other persons except where such interference is justified or constitutes an exercise of an absolute right: Restatement, Torts, § 766. The Special Note to comment m. in § 766 points out: 'There are frequent expressions in judicial opinions that "malice" is requisite for liability in the cases treated in this Section. But the context and course of decision make it clear that what is meant is not malice in the sense of ill will but merely purposeful interference without justification.' Our cases are in accord: *Klauder v. Cregar*, [supra;] *Dora v. Dora*, [supra.]
>
> "The elements of this tort of inducing breach of contract or refusal to deal, which must be averred in the complaint, are set forth in the Restatement, Torts, § 766, which says, '. . . one who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby'. In other words, the actor must act (1) for the purpose of causing this specific type of harm to the plaintiff, (2) such act must be unprivileged, and (3) the harm must actually result."

402 Pa. at 300-301, 167 A.2d at 474 (footnotes omitted).[13]

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13. Accordingly, in Birl we compared plaintiff 's allegations that the defendants induced plaintiff 's employer to terminate plaintiff 's employment with the elements set forth in Section 766 and concluded that the plaintiff "sufficiently aver[red] an intentional or purposeful, and unprivileged, interference with his contractual or business relationship aimed at a severance of [plaintiff 's employment], to constitute an actionable wrong." 402 Pa. at 303, 167 A.2d at 475.

In its continuing effort to provide the judicial system orderly and accurate restatements of the common law, the American Law Institute has reviewed each section of the Restatement of Torts, including Section 766. Section 766 of the Restatement (Second) of Torts (Tent. Draft No. 23, 1977), states the Institute's present view of what constitutes the elements of the cause of action before us:

> **"Intentional Interference with Performance of Contract by Third Person**
>
> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the third person's failure to perform the contract."

Note 13—*Continued*

Since *Birl*, we have repeatedly looked to the Restatement as authority for the elements of a cause of action for intentional interference with existing contract relations. E.g., *Capecci v. Liberty Corp.*, 406 Pa. 197, 167 A.2d 664 (1962) (applying Restatement, but denying plaintiff relief for want of proper proof of unlawful inducement); *Glazer v. Chandler*, 414 Pa. 304, 308, 200 A.2d 416, 418 (1964) ("where, as in this case, the allegations and evidence only disclose that defendant breached his contracts with plaintiff and that as an incidental consequence there plaintiff 's business relationship with third parties have been affected an action lies only in contract for defendant's breaches, and the consequential damages recoverable, if any, may be adjudicated only in that action"). Also, in *Glenn v. Point Park College*, 441 Pa. 474, 272 A.2d 895 (1971), we made clear our adoption of that portion of Section 766 relating to interference with prospective, as opposed to existing, contract relations. Thus, in *Glenn*, we upheld real estate brokers' right of action where they sought damages from the vendee of realty for the vendee's direct purchase of realty from the vendor, depriving brokers "prospective economic gain" in the form of anticipated commissions on the sale.

This Court constantly seeks to harmonize common law rules, principles, and doctrines with modern perceptions of societal needs and responsibilities. See e.g., *Glenn v. Point Park College*, 441 Pa. 474, 481, 272 A.2d 895, 899 (1971) (relying upon Tentative Draft of § 766A, Restatement (Second) of Torts (Tent. Draft No. 14, 1969), in upholding right of action for interference with prospective contract relations).[14] Accordingly, we believe it appropriate to analyze this case in light of the approach fashioned by Restatement (Second). Accord, *Augustine v. Anti-Defamation League*, 75 Wis.2d 207, 249 N.W.2d 547 (1977).

An examination of this case in light of Restatement (Second) of Torts, § 766, reveals that the sole dispute is whether appellees' conduct is "improper." There is no doubt that appellees intentionally sought to interfere with performance of the contractual relations between Adler Barish and its clients. While still at Adler Barish, appellees' behavior, particularly their use of expected fees from Adler Barish clients' cases, indicates appellees' desire to gain a segment of the firm's business. This pattern of conduct continued until the court of common pleas enjoined it. Indeed, appellees' intentional efforts to obtain a share of Adler Barish's business were successful. The record reveals that several clients signed the forms Epstein prepared on behalf of appellees notifying Adler Barish that the clients no longer wished the services of Adler Barrish.[15] Likewise,

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14. Cf. *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 793 (3rd Cir., No. 77-1620, filed August 11, 1978, slip op. at 20-21) (federal court of appeals, reviewing conclusions of law of federal district court sitting in diversity case, observing that: "the Supreme Court of Pennsylvania's customary practice, in fashioning new principles of law, of according great weight to the decisions of other jurisdictions and the trend of recent cases would lead it to follow . . . numerous courts . . . in situations analogous to the present case") (footnote, citing Pennsylvania cases, omitted).

15. Plaintiff 's Exhibits P-20 — P-29 are the forms Epstein prepared discharging Adler Barish as counsel which various Adler Barish clients signed.

the record reveals that Adler Barish and its clients were parties to valid, existing contracts.[16]

In assessing whether appellees' conduct is "improper," we bear in mind what this Court stated in *Glenn v. Point Park College*, supra, 441 Pa. at 482, 272 A.2d at 899, where we analyzed "privileges" in conjunction with the closely related right of action for intentional interference with prospective contract relations:

> "The absence of privilege or justification in the tort under discussion is closely related to the elements of intent. As stated by Harper & James, The Law of Torts, § 6.11, at 513-14: '. . . where, as in most cases, the defendant acts at least in part for the purpose of protecting some legitimate interest which conflicts with that of the plaintiff, a line must be drawn and the interests evaluated. This process results in according or denying a privilege which, in turn, determines liability.' What is or is not privileged conduct in a given situation is not susceptible of precise definition. Harper & Hames refer in general to interferences which 'are sanctioned by the "rules of the game" which society has adopted', and to 'the area of socially acceptable conduct which the law regards as privileged,' id. at 510, 511, and treat the subject in detail in §§ 6.12 and 6.13."

We are guided, too, by Section 767 of Restatement (Second) of Torts which focuses on what factors should be considered in determining whether conduct is "improper:"

16. See supra note 4; *Richette v. Pennsylvania Railrod*, 410 Pa. 3, 21, 187 A.2d 910, 918 (1963) (" 'the law has long been settled that contracts for [contingent] fees are unlawful and enforceable by the courts' ").

> "In determining whether an actor's conduct in intentionally interfering with an existing contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) The nature of the actor's conduct,
> (b) The actor's motive,
> (c) The interests of the other with which the actor's conduct interferes,
> (d) The interests sought to be advanced by the actor,
> (e) The proximity or remoteness of the actor's conduct to the interference and
> (f) The relations between the parties."[17]

We find nothing in the " 'rules of the game which society has adopted' "[18] which sanctions appellees'

17. Thus, new Restatement (Second) of Torts focuses upon whether conduct is "proper," rather than "privileged." Compare Restatement of Torts, § 766 (1939) ("[e]xcept as stated in Section 698 [(relating to contracts to marry)], *one who without a privilege to do so*, induces or otherwise purposely causes a third person not to ¶ (a) perform a contract with another, or ¶ (b) enter into or continue a business relation with another ¶ is liable to the other for the harm caused thereby"). Comment b to Restatement (Second) of Torts, supra at § 767, explains the shift in inquiry:

> "*Privilege to interfere, or interference not improper.* Unlike other intentional torts such an intentional injury to person or property, or defamation, this branch of tort law has not developed a crystallized set of definite rules as to the existence or non-existence of a privilege to act in the manner stated in §§ 766, 766A or 766B. Because of this fact, this Section is expressed in terms of whether the interference is improper or not rather than in terms of a specific privilege to act in the manner specified. The issue in each case is whether the interference is improper or not under the circumstnces; whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another."

18. *Glenn v. Point Park College*, supra, 441 Pa. at 482, 272 A.2d at 899, quoting Harper & James, The Law of Torts, § 6.11.

conduct. Indeed, the rules which apply to those who enjoy the privilege of practicing law in this Commonwealth expressly disapprove appellees' method of obtaining clients. Supra Part IIA, discussing Code of Professional Responsibility, DR 2-103(A). We find such a departure from "[r]ecognized ethical codes" "significant in evaluating the nature of [appellees'] conduct." Restatement (Second) of Torts, supra at § 767 comment c.[19] All the reasons underlying our Disciplinary Rules' "proscription against [appellees'] self-recommendation," *Berlant Appeal*, supra, 458 Pa. at 443, 328 A.2d at 474, especially the concern that appellees' contacts too easily could overreach and unduly influence Adler Barish clients with active cases, are relevant here.

Appellees' conduct adversely affected more than the informed and reliable decisionmaking of Adler Barish clients with active cases. Their conduct also had an immediate impact upon Adler Barish. Adler Barish was prepared to continue to perform services for its clients and therefore could anticipate receiving compensation for the value of its efforts. Moreover, as we concluded in *Richette v. Pennsylvania Railroad*, 410 Pa. 6, 187 A.2d 910 (1963), Adler Barish's fee agreements with clients were a source of anticipated revenue protected from outside interference.[20]

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19. Restatement (Second) of Torts, supra at § 767 comment c, provides in full:

> "*Business ethics and customs.* Recognized ethical codes for a particular area of business activity and established customs or practices regarding approved or disapproved actions or methods may also be significant in evaluating the nature of the actor's conduct as a factor in determining whether his interference with the plaintiff 's economic relations was improper or not."

20. In *Richette*, an attorney representing an employee of the defendant railroad company and member of the defendant union, brought suit charging that defendants improperly interfered with a fee agreement between plaintiff and the employee. The employee, injured at work, had retained plaintiff, but later discharged him. In upholding the jury's award of compensatory damages for plaintiff, this Court concluded:

> "The jury was warranted in finding from the evidence presented that the named defendants coordinated, through wile, stratagem and deception to separate an attorney from his client. It could not be said, as a matter of the law, that the jury went astray when they concluded, as they must have, that [the employee] did not voluntarily write a letter revoking his power of attorney to [plaintiff]. Logic, sequence of events, and palpable circumstances justify their conclusion that the railroad company representatives prepared a letter of revocation, that they employed a maneuver to have [the employee] copy that letter outside the railroad company office, thinking that this would wipe away their participation in the affair; that they supplied [the employee] with the paper on which he was to copy the letter of revocation; that [a union official], working with the railroad, supervised the copying, and supplied the envelope, in which he placed the letter, which he consigned to the United States mails. The jury were warranted in concluding that all the named defendants were a part of this plan and participated fully in the enterprise which finally resulted in depriving a member of the Philadelphia bar from legal business properly his."

410 Pa. at 13-14, 187 A.2d at 914-15. First Pennsylvania Bank's willingness to extend appellees credit on the basis of expected fees from cases confirms the financial significance of Adler Barish's fee agreements.

It is true that, upon termination of their employment relationship with Adler Barish, appellees were free to engage in their own business venture. See Restatement (Second) of Agency, § 396(a)(1958) ("[u]nless otherwise agreed, after termination of the agency, the agent . . . has no duty not to compete with the principal"); *Carl A. Colteryahn Dairy, Inc. v. Schneider Dairy*, 415 Pa. 276, 203 A.2d 469(1964) (trial court improperly enjoined competition with former employer, in the absence of either non-competition covenant or protectible "customer route"). But appellees' right to pursue their own business interests is not absolute. "[U]nless otherwise agreed, after the termination of

the agency, the agent . . . has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation"). Restatement (Second) of Agency, supra at § 396(d).

Appellees' contacts were possible because Adler Barish partners trusted appellees with the high responsibility of developing its clients' cases. From this position of trust and responsibility, appellees were able to gain knowledge of the details, and status of each case to which appellees had been assigned. In the atmosphere surrounding appellees' departure, appellees' contacts unduly suggested a course of action for Adler Barish clients and unfairly prejudiced Adler Barish. No public interest is served in condoning use of confidential information which has these effects. Clients too easily may suffer in the end.[21]

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21. Moreover, appellees neither occupied the same status, nor pursued the same goals, as the defendants in *Watch Tower Bible & Tract Society v. Dougherty*, 337 Pa. 286, 11 A.2d 147 (1940). There, we concluded that defendants, leaders of their church, "cannot be mulcted in damages for protesting against the utterances of one who they believe attacks their church and misrepresents its teachings or for inducing their adherents to make similar protests." 337 Pa. at 288, 11 A.2d at 148. Nor were appellees engaging in conduct like the defendant in *R. S. Noonan, Inc. v. York School District*, 400 Pa. 391, 162 A.2d 623 (1960) (alternative holding), where we found "privileged" the actions of a school board architect who, upon the direction of the school board, advertised for new bids after the board rejected plaintiff 's previous low bid.

Appellees suggest that injunctive relief was inappropriate. "It is well settled that equity will act to prevent unjustified interference with contractual relations." *Neel v. Allegheny County Memorial Park*, 391 Pa. 354, 357, 137 A.2d 785, 786 (1958). Accord, Restatement (Second of Torts, supra at § 766 comment t (approving injunctive relief "in appropriate circumstances"). Given appellees' interest in maintaining the line of credit established on the basis of Adler Barish cases, and appellees' express intent to continue their effort to gain Adler Barish clients, we believe the court of common pleas could properly conclude that equitable relief was necessary to protect all the interests at stake in this case.

IV. Conclusion

In *Ohralik*, Mr. Justice Powell emphasized:

> "[T]he state bears a special responsibility for maintaining standards among members of the licensed professions. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S. Ct. 461, 99 L.Ed. 563 (1955); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 55 S.Ct 570, 79 L.Ed. 1086 (1935). 'The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts." ' *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975). While lawyers act in part as 'self-employed businessmen,' they also act 'as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.' *Cohen v. Hurley*, 366 U.S. 117, 124, 81 S.Ct. 954, 958, 6 L.Ed.2d 156 (1961)."

Ohralik v. Ohio State Bar Association, 436 U.S. at 460, 98 S.Ct. at 1920-21. Our "special responsibility" includes the obligation to assure that persons seeking professional legal assistance receive the quality advocacy and fair treatment they justifiably expect. Our responsibility also includes the duty to provide an atmosphere conducive to proper attorney-client relationships, including those situations where, as here, associates assist other members of a firm in rendering legal services. Consistent with these jurisprudential concerns, our supervisory authority over practitioners in our courts, prior decisions, the Code of Professional Responsibility, and Restatement (Second) of Torts, it must be concluded that the court of common pleas correctly determined that Adler Barish is entitled to relief.

Order of the Superior Court reversed and court of common pleas directed to reinstate its final decree. Each party pay own costs.

Mr. Justice MANDERINO filed a dissenting opinion.

APPENDIX

Epstein sent the following cover letter:

404 South Camac Street
Philadelphia, Pennsylvania 19147
March 25, 1977

Re:

Dear

In confirmation of our recent conversation, I have terminated my association with the offices of Adler, Barish, Daniels, Levin and Creskoff and will be continuing in the practice of law in center city Philadelphia. As I explained, you have the right to determine who shall represent your interests and handle the above-captioned matter in the future. You may elect to be represented by my former office, me or any other attorney permitted to practice in this jurisdiction.

During our conversation, you expressed a desire to have me continue as your legal representative, and in recognition of your choice in this regard, I have enclosed two documents which must be signed and returned to me in the enclosed stamped, addressed envelope to effect this end. Copies of these documents are also enclosed for your records.

If you have any questions regarding these materials or any other matter, feel free to call me at KI 6-5223.

Sincerely,

Alan B. Epstein

ABE/ete
Enclosure

The Form discharging Adler Barish provides:

Messrs. Adler, Barish, Daniels, Levin & Creskoff
2nd Floor, Rohm & Haas Building
Sixth & Market Streets
Philadelphia, PA 19106

Re:

Gentlemen:

I have been advised that Alan B. Epstein, Esquire has terminated his association with your firm of attorneys and it has been carefully explained to me that I have the right to determine who shall represent me and handle the above-captioned matter.

This correspondence is to serve notice I hereby discharge the office of Adler, Barish, Daniels, Levin & Creskoff from any further representation of me whatsoever and request that the members of your firm and/or your employees or agents refrain from acting against my wishes in this regard or my interests in any way whatsoever.

This letter is to also serve as my notice and request that I want Alan B. Epstein to be my attorney in this matter, to keep or secure my file and all allied papers, and to handle this matter and represent me.

I further direct you to deliver immediately to my attorney, Alan B. Epstein, my entire file and all allied papers and to refrain further from any actions contrary to my attorney's wishes or directions in connection with this matter.

Very truly yours,

The following fee agreement was also sent to Adler Barish clients:

CONTINGENT FEE AGREEMENT

_____
Date

I (we) hereby constitute and appoint ALAN EPSTEIN as my (our) attorney to prosecute a claim for me (us) for _____ against all responsibile parties, including, but not limited to _____. The claimant (deceased) is _____, and the cause of action arose on _____.

I (we) hereby agree that the compensation of my (our) attorney for services shall be determined as follows:

_____

_____

_____

I (we) hereby acknowledge receipt of a duplicate copy of this Contingent Fee Agreement.

_____ _____
Name Name

_____ _____
Address Address

[J.209]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ADLER, BARISH, DANIELS, LEVIN, AND CRESKOFF, A PARTNERSHIP, *Appellant*	:	No. 73 January Term, 1978
vs.	:	Appeal from the Order of the Superior Court, No. 1478 October Term, 1977, reversing the Decree of the Court of Common Pleas of Philadelphia, No. 195 April Term, 1977.
ALAN B. EPSTEIN, RICHARD A. WEISBORD, ARNOLD J. WOLF AND SANFORD I. JABLON	:	

DISSENTING OPINION

MANDERINO, J. Filed October 5, 1978

I dissent. The opinions of Judge Hoffman and Judge Spaeth in the Superior Court leave no doubt that injunctive relief in this case is completely unwarranted. *Adler, Barish, et al. v. Epstein, etc.* Superior Court, 382 A.2d 1286 (1977). Since their opinions were filed, *Ohralik v. Ohio State Bar Association* 436 U.S. 447, ___ L.Ed. ___, 98 S.Ct. *1912 (1978)* has been decided by the United States Supreme Court. That decision relied on by the majority does not support the majority's reinstatement of an injunction in violation of appellees' free speech rights. *Ohralik* condemned *in-person* solicitation which deprives citizens of an opportunity for reflection before signing quickly on the dotted line. *Id. at* 1917. It does not, as the majority asserts, condemn regulation of the type of speech or conduct engaged in by the appellees which *did not* include any coercive *in-person* solicitation. The majority's reliance on *Ohralik* is completely unwarranted.

Specifically, the majority relying on *Ohralik* concludes that appellees, former associates of the law firm, Adler, Barish, engaged in illegal solicitation when they mailed to the clients of Adler, Barish form letters which could be executed to discharge Adler, Barish as counsel, name appellees as client's new counsel and then create a contingent fee agreement.

Contrary to the majority's analysis, however, the United States Supreme Court's decision in *Ohralik* does not prohibit the type of direct solicitation which is before this Court today.

When the majority says that "just as in *Ohralik*, the [Federal] Constitution permits regulation of their [appellees'] conduct, it widely misses the mark. *See* Slip Opinion pg. 11.

One need not be a legal scholar to see the distinction for First Amendment purposes between the ambulance-chasing tactics used by the lawyer in *Ohralik* and the written communications which appellees mailed to the clients of Adler, Barish. The letters sent to prospective clients which would discharge Adler, Barish should the client sign on the dotted line contained *no* arm-twisting device pressuring clients to make an immediate response. Nor were these clients uninformed about the choices they could make in either retaining or discharging Adler, Barish as legal counsel. Additionally, appellees' communication contained *no* false and misleading statements which would confuse, deceive, or mislead prospective clients. More importantly, appellees did not attempt to motivate these clients to stir up litigation as was done in *Ohralik*.

This Court today misuses its injunctive powers to prohibit not only what is a protected form of direct solicitation under the First Amendment but to prohibit an attorney from truthfully informing a client about the client's legal rights. The Order of the Superior Court should therefore be affirmed.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ADLER, BARISH, DANIELS, LEVIN AND CRESKOFF, A PARTNERSHIP, *Appellant*: No. 73 January Term, 1978

vs.

ALAN B. EPSTEIN, RICHARD A. WEISBORD, ARNOLD J. WOLF AND SANFORD I. JABLON

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of COMMON PLEAS of PHILADELPHIA COUNTY, be, and the same is hereby AFFIRMED. ORDER OF SUPERIOR COURT IS REVERSED. EACH PARTY PAY OWN COSTS.

BY THE COURT:

Sally Mrvos, Esquire
Prothonotary

Dated: October 6, 1978

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

November 9, 1978

Alan M. Lerner, Esquire
Joseph M. Donley, Esquire
22nd Floor
PSFS Building
12 South Twelfth Street
Philadelphia, PA 19107

Re: Adler, et al., a Partnership, Plaintiff-Appellant v. Alan B. Epstein, et al., Defendants-Appellees No. 73 January Term, 1978

Gentlemen:

This is to advise you that the following Order has been endorsed on your Application for Reargument, filed in the above-captioned matter:

"11/6/78
Petition denied.
Per Curiam."

Very truly yours,

Sally Mrvos
Prothonotary

By _____
Catherine E. Lyden
Deputy Prothonotary

CEL:bl

cc: Drinker, Biddle & Reath
Patrick T. Ryan, Esquire
West Publishing Company
Argued 4/20/78 - J.209
Decision - 10/5/78

ATTENTION OF WEST PUBLISHING COMPANY: Will you please acknowledge receipt of this letter.

Received _____
By _____

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALAN B. EPSTEIN,
RICHARD A. WEISBORD,
ARNOLD J. WOLF, AND
SANFORD I. JABLON,
Appellants No. 73

v.

ADLER, BARISH, DANIELS, LEVIN AND CRESKOFF, A PARTNERSHIP,
Appellees January Term, 1978

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that Alan B. Epstein, Richard A. Weisbord, Arnold J. Wolf and Sanford I. Jablon, hereby appeal to the Supreme Court of the United States from the Final Judgment of the Supreme Court of Pennsylvania affirming the judgment of the Court of Common Pleas of Philadelphia County and reversing the judgment of the Superior Court of Penn-

sylvania. The said judgment of the Supreme Court was entered October 6, 1978. Appellants filed a timely Application for Reargument which was denied November 9, 1978.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

ALAN M. LERNER, ESQUIRE
Suite 2200
12 S. 12th Street
Philadelphia, PA 19107
Attorneys for Appellants

Of Counsel:

COHEN, SHAPIRO, POLISHER,
SHIEKMAN AND COHEN

Dated: November 30, 1978

Supreme Court, U. S.
FILED
MAY 9 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 78-1521.

ALAN B. EPSTEIN, SANFORD I. JABLON,
RICHARD A. WEISBORD, and ARNOLD J. WOLF,
Appellants,

v.

ADLER, BARISH, DANIELS, LEVIN & CRESKOFF,
a Partnership,
Appellee.

On Appeal From the Supreme Court of Pennsylvania.

MOTION OF APPELLEE TO DISMISS OR AFFIRM.

PATRICK T. RYAN,
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MOTION OF APPELLEE ADLER BARISH DANIELS LEVIN & CRESKOFF TO DISMISS OR AFFIRM.

Appellee Adler Barish Daniels Levin and Creskoff ("Adler Barish") respectfully moves this Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania, on the ground that the judgment is not one from which a right of review by appeal lies, and that in any event the questions raised by appellants are so insubstantial that they do not support jurisdiction on appeal or warrant further consideration by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Title 28, United States Code, Sections 1257(2) & (3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. . . .

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech. . . .

QUESTIONS PRESENTED.

1. Whether this appeal must be dismissed because appellants did not draw into question the validity of the Disciplinary Rules of the Pennsylvania Code of Professional Responsibility and because the Pennsylvania Supreme Court did not render a decision in favor of those Rules.

2. Whether the questions set forth in the Jurisdictional Statement are genuinely raised on the record in this case.

3. Whether the constitutional issues actually raised by the record are so insubstantial as not to merit further consideration by this Court.

ARGUMENT.

I. The Proceedings Below.

This case was brought by the appellee law firm Adler Barish against four recently terminated associates, after the firm discovered that they had commenced a large scale campaign to induce existing clients of the firm to terminate Adler Barish and to hire them instead. The firm claimed that this conduct constituted tortious interference with business relations and an abuse of confidential employment positions forbidden by the common law of Pennsylvania. The defendants argued that Pennsylvania law did not forbid their conduct, and that in any event the First Amendment protected it. Adler Barish sought and obtained preliminary and final injunctive relief. At the conclusion of the evidentiary hearing, the trial judge entered an order enjoining the defendants from contacting the firm's clients, but permitting them to send announcements of their new practice to all those clients, and permitting them to represent any of the firm's clients who chose to discharge the firm and hire the defendants instead.

The Superior Court reversed the trial court by a 4-3 vote, but the Supreme Court of Pennsylvania reversed the Superior Court by a vote of 6 to 1 and ordered the decree of the trial court reinstated. In an opinion by Mr. Justice Roberts, the Pennsylvania Supreme Court held that appellees had acted in violation of Pennsylvania tort law and that the constitution did not confer on appellants any privilege to act as they did. Appellants filed a notice of appeal to this Court.

II. The Appeal Must Be Dismissed Because Appellants Did Not "Draw Into Question the Validity of a [State] Statute," and Because There Was No "Decision in Favor of Its Validity" Within the Meaning of 28 U. S. C. § 1257(2).

Appellants purport to bring this appeal pursuant to 28 U. S. C. § 1257(2), which provides for review in this Court by appeal, "where is drawn into question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." Appellants' Jurisdictional Statement asserts that this case questions the validity of Disciplinary Rules 2-103(A) and 2-104(A) of the Pennsylvania Code of Professional Responsibility. The record, however, shows that appellants did not directly "draw into question" the validity of these rules [1] below, and that the decision of the Supreme Court of Pennsylvania was not one "in favor of [their] validity." Instead, this is a case in which the Pennsylvania Supreme Court construed the Pennsylvania common law of tortious interference with business relations, and decided against appellants' asserted constitutional privilege to engage in the conduct which that common law forbids. Accordingly, review may only be had, if at all, by writ of certiorari pursuant to 28 U. S. C. § 1257(3).[2]

1. We assume for purposes of this appeal that the Pennsylvania Supreme Court's Disciplinary Rules are a "statute" within the meaning of 28 U. S. C. § 1257(2). *Lathrop v. Donohue*, 367 U. S. 820 (1961); *Cf. Ohralik v. Ohio State Bar Association*, 436 U. S. 447 (1978). If, however, this case were not so clearly outside § 1257 (2) for the reasons detailed above, we would urge reconsideration of this construction of the statute.

2. That section provides for review by writ of certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States. . . ." 28 U. S. C. § 1257(3).

This was not a proceeding under the Pennsylvania Code of Professional Responsibility, and neither party treated it as such below. In fact, counsel for appellants argued in the Superior Court of Pennsylvania that exclusive jurisdiction to enforce these rules lies in the Disciplinary Board of the Supreme Court of Pennsylvania. Rule 17-1, Pennsylvania Rules of Disciplinary Enforcement; Brief for Appellant in the Superior Court, p. 18. The Superior Court found it unnecessary to reach that question, considering the case one to be decided under Pennsylvania's common law of tortious interference. *See* Opinion of the Superior Court, p. A-23,[3] n. 9 and accompanying text. Moreover, appellants were not and could not have been disciplined in or based on these proceedings.

Appellants did not assert the invalidity of these rules below; rather they argued that their conduct could not constitutionally be regulated under Pennsylvania's tort law. Therefore, appellants' claim here is like that discussed in *Mergenthaler Linotype Company v. Davis*, 251 U. S. 256 (1920). In that case it was asserted that the contract at issue was made in interstate commerce and therefore not constitutionally subject to state statutes. The Court held this claim "insufficient to challenge the validity of the [state statute]; at most it asserted a 'title, right, privilege or immunity' under the Federal Constitution which might afford basis for certiorari but constitutes no ground for writ of error[4] from this court." 251 U. S. at 259. This case is the same. As this Court more recently pointed out: "It is essential to our jurisdiction on appeal . . . that there be an *explicit* and timely insistence in the state courts that a state statute, as applied, is repugnant to

3. Page references such as this are to the Appendix to appellants' Jurisdictional Statement.

4. The review as of right applicable at the time that case was decided; its successor is the current appeal under 28 U. S. C. § 1257 (2). *See* Act of September 6, 1916, c. 448, 39 Stat. 726.

the federal Constitution, treaties or laws." *Charleston Federal Savings and Loan Association v. Alderson*, 324 U. S. 182, 185 (1945) (emphasis added). *Accord, Ungar v. Sarafite*, 376 U. S. 575, 582-3 (1964).

Equally important, the Pennsylvania Supreme Court did not make a decision "in favor of [the] validity" of the Disciplinary Rules in this case. One need only read the Court's opinion:

> Adler Barish argues that appellees' [appellants in this Court] conduct constitutes an intentional interference with existing contractual relationships between Adler Barish and its clients. . . . Appellees, on the other hand, contend that their conduct was "privileged" and that therefore no right of action for intentional interference lies. Moreover, they argue that their conduct is protected under the first and fourteenth amendments to the Constitution of the United States.
>
> P. A-42.

Writing for the court, Mr. Justice Roberts rejected appellants' constitutional claim. It is true that in doing so he discussed the fact that appellants' conduct clearly violated the Pennsylvania Code of Professional Responsibility and that this Court in *Ohralik v. Ohio State Bar Association*, 436 U. S. 447 (1978), had sustained the validity of an identical rule against a constitutional challenge. But the Pennsylvania Court was not sustaining the Disciplinary Rules against an assault on their validity; it was merely reasoning by analogy from this Court's most recent decision on the subject—a decision it found persuasive and controlling.[5]

5. Similarly, the apparent violation of the Disciplinary Rules was among the factors considered in deciding whether there should be a privilege as a matter of Pennsylvania common law: "We find such a departure from '[r]ecognized ethical codes' 'significant in evaluating the nature of [appellants'] conduct.'" P. A-46. But that decision of state tort law is of course not properly reviewed in this court.

The federal question considered was whether Pennsylvania may constitutionally forbid appellants' conduct as tortious interference. While the Pennsylvania court's decision in this case could have an impact, by force of logic or *stare decisis*, on some later case in which the validity of the Disciplinary Rules is challenged, those rules were not challenged here and their validity was not upheld. Thus these rules are even more "tangentially involved" than the statute found not "drawn into question" in *Garrity v. New Jersey*, 385 U. S. 493, 495-6 (1967). Accordingly, review is available in this Court, if at all, only by its discretionary certiorari jurisdiction and the appeal must be dismissed.

III. The Issues Set Forth in the Jurisdictional Statement Are Not Genuinely Presented by the Record Before This Court.

Appellants include in their Statement of Questions Presented and in their Statement of the Case assumptions and assertions which are simply not supported by the record before this Court; in fact, they often represent factual positions contended for by appellants, but resolved against them by the courts below. For example, appellants repeatedly suggest that they merely informed clients in a straightforward, neutral fashion of their impending departure from Adler Barish. They give the impression that only upon further inquiry by clients did they advise clients on their options regarding representation. P. 6. Finally, they suggest that the "discharge package"[6] they mailed to the clients was only sent to those clients who asked for help in effectuating a discharge. P. 7. But the

6. Following their in-person solicitation of individual clients, appellants mailed them a package including a form letter discharging Adler Barish, a completed contingent fee contract naming an appellant as attorney, and a stamped, addressed return envelope. *See* pp. A-59-A-61.

findings of the courts below are plainly to the contrary. Those findings illustrate an organized campaign to contact the firm's clients in person and to persuade them to become appellants' own.

The courts below found as a fact that defendant Epstein initiated contacts with clients of the firm "attempting to secure them and their open cases for himself and his new firm." Finding 19, p. A-16. The courts found as a fact that he engaged in solicitation in these contacts. *Id.* They further found that defendant Wolf, in the presence of two other defendants, stated his intention to contact Adler Barish clients "to attempt to secure them as his own clients." Finding 24, p. A-7. Finally, it was found as a fact that the defendants all asserted the intent, unless enjoined, to continue to contact clients of Adler Barish "in order to attempt to secure them as their (defendants') clients." Finding 26, p. A-8.

Nor did appellants in every case send their "discharge package" only in response to a client's request. The court found that at least one client (whose case had already been settled at the time, although distribution of the settlement had not yet been made) was mailed this package even though he never requested anything of the sort. Finding 22, p. A-7. The package sent him was nonetheless like the others, purporting to act on that client's instructions. *See* p. A-59. In both their in-person contacts with clients and in their mailings, appellants did not merely inform clients about their options, but rather suggested the course those clients should follow.

Appellants' statement of facts also ignores other aspects of their course of conduct found by the courts below, including the fact that they were found to have taken advantage of confidential information learned in the course of their employment. *See* p. A-56. The courts also found that defendant Epstein received certain fees and

kept them for himself, contrary to firm policy, and that shortly before he left, he began maintaining files for some cases without informing the firm (also contrary to firm policy). *See* p. A-39, n. 5.

Appellants, *who did not challenge these findings of fact in the Pennsylvania Supreme Court,*[7] cannot now ignore them or invent others simply to suit their convenience.[8] The record in this case simply does not support the scenario appellants conjure in their Jurisdictional Statement.

IV. The Constitutional Issues Presented on the Record in This Case Are So Insubstantial as Not to Merit Plenary Consideration by This Court.

Whether one treats appellants' Jurisdictional Statement as a petition for certiorari or considers this matter as properly before this Court on appeal, it is plain that the federal questions brought before the Court are neither novel, important, nor substantial. The following sections deal seriatim with the questions appellants present.

A. This Court's Decision in the *Ohralik* Case Justifies Pennsylvania's Regulation of Appellant's Conduct—Direct, In-Person Solicitation of Clients by Attorneys.

This appeal should be dismissed or the Pennsylvania Supreme Court affirmed because this Court's recent decision in *Ohralik v. Ohio State Bar Association, supra,* squarely controls the issues presented here. Like *Ohralik,* this case deals with the direct, in-person solicitation of clients by attorneys, with the same dangers (and proven instances) of overreaching and misrepresentation. And as in *Ohralik,* appellants here contend that their solicitation cannot be proscribed consistent with the First Amendment.

It should be noted at the outset that the speech implicated here is purely "commercial speech", in no sense like that dealt with in *In re Primus,* 436 U. S. 412 (1978), or *NAACP v. Button,* 371 U. S. 415 (1963). As this Court pointed out in *Ohralik, supra*:

> A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation. [citation omitted]. While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests. 436 U. S. at 459.

The Court in *Ohralik* then weighed the very substantial state interests in regulating attorney conduct against the First Amendment, and determined that the state could constitutionally proscribe solicitation by attorneys.

This case is the same, except that here the attorney's conduct was forbidden in the context of the state's common law prohibition against tortious interference with contract. This is no reason to change the constitutional analysis. Nor did the Court in *Ohralik* limit its holdings to approval of the state's regulation of the specific conduct of that litigant:

> [A]ppellant errs in assuming that the constitutional validity of the judgment below depends on proof

7. Indeed, they stated at page 12 of their brief in that court that "[Adler Barish] has argued that such findings should not be disturbed, a position with which we vociferously agree."

8. The statement of the case also contains lengthy recitations of irrelevant matter. It includes the text of the preliminary injunction in this case, which is plainly no longer the source of any live controversy and not challenged in this appeal. It also suggests that under Pennsylvania procedure, appellants should have been permitted to file preliminary objections to the complaint. This, of course, is a wholly non-federal issue. Such allegations are not dealt with further in the jurisdictional statement, and will not be commented on further here.

that his conduct constituted actual overreaching or inflicted some specific injury on [the prospective client]. . . .

Appellant's argument misconceives the nature of the State's interest. The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the States seeks to avert. *In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.*

. . .

Under such circumstances, it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited.

436 U. S. at 464, 466. (emphasis added).

See also, Friedman v. Rogers, — U. S. —, 47 U. S. L. W. 4151, 4154 (1979) (a form of commercial speech could be forbidden where there was a "significant possibility" that it would be used to mislead the public).

Even if the *Ohralik* holding required that in every case there be circumstances likely to result in misrepresentation and overreaching, such circumstances were certainly present here. Appellants make much of the fact that they had worked as employees of the firm on the cases of the clients they solicited. But this *increases* rather than decreases the dangers of overreaching in their

solicitation of these people as clients. And Epstein's mailing of the "discharge package" to Mr. Perkins after discussing the settlement of his case with him is a textbook example of overreaching and misrepresentation by an attorney. As Mr. Justice Roberts wrote for the Supreme Court of Pennsylvania: "Just as in *Ohralik*, appellees' conduct frustrates, rather than advances, Adler Barish clients' 'informed and reliable decision making.'" P. A-46. Because the facts of this case are so clearly controlled by this Court's teachings in *Ohralik*, the question raised by appellants is insubstantial, and the judgment of the Supreme Court of Pennsylvania should be summarily affirmed.

B. The Injunction in This Case Is Neither Unconstitutionally Overbroad Nor an Impermissible Prior Restraint on Speech.

Appellants also seek to take advantage of the traditional First Amendment doctrines regarding overbreadth and prior restraint. This argument is easily dealt with, since this Court has held that these doctrines do not apply in this context. In *Bates v. State Bar of Arizona,* 433 U. S. 356 (1977), this Court specifically held the doctrine inapplicable to attorney advertising:

> [T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. . . . Since overbreadth has been described by this Court as "strong medicine," which "has been employed . . . sparingly and only as a last resort," *Broderick v. Oklahoma,* 413 U. S. at 613, we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective.
>
> 97 S. Ct., at 2707-8.

Similarly, this and other courts have refused to apply to commercial speech the traditional prohibition against prior restraints. *Virginia Pharmacy Board v. Virginia Consumer Council* 424 U. S. 748, 772 n. 24 (1976); *Friedman v. Rogers, supra,* 47 U. S. L. W. at 4154; *Beneficial Corporation v. Federal Trade Commission,* 542 F. 2d 611, 619 (3d Cir. 1976).

In any event, the order in this case was a reasonably necessary means of accomplishing the state's remedial objective. The court here was dealing with particularly egregious conduct and with an openly avowed intent on the part of appellants to resume soliciting clients if not enjoined. Finding 26, p. A-8. Moreover, communication which did not pose dangers of misrepresentation and overreaching was permitted under the order. As the Supreme Court of Pennsylvania pointed out, nothing in the challenged decree prohibited appellants from engaging in truthful advertising protected under *Bates,* including advertising designed to inform Adler Barish clients of appellants' new firm and its availability to serve those clients. They were explicitly permitted to send (and did send) formal announcements regarding the formation of their firm to clients of Adler Barish. And they were explicitly left free to represent those clients who voluntarily chose to discharge Adler Barish and to hire them instead. Thus alternate channels to communicate the new practice remained available. Accordingly, the injunction was for the most part a regulation of the time, place, and manner of speech. Such regulation is permissible even for "ideological" speech. *Friedman v. Rogers, supra,* 47 U. S. L. W. at 4153; *Grayned v. City of Rockford,* 408 U. S. 104 (1972); *Virginia Pharmacy, supra,* 425 U. S. at 771.

C. This Case Presents No Problems of Vagueness.

Finally, appellants try to force another traditional First Amendment doctrine—vagueness—into this case. But the vagueness doctrine fits this situation no better than the others. As the Court pointed out only a few months ago, "Our decisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area." *Friedman v. Rogers, supra,* 47 U. S. L. W. at 4154 n. 9. Even if the doctrine applied in the context of commercial speech, one would have to strain mightily to relate it to this case.

Appellants direct their vagueness challenge at Disciplinary Rule 2-103(A).[9] We note again that this rule was not enforced against appellants in this case; rather, the Pennsylvania common law of torts provided the basis for the injunction. Appellants have not been disciplined or otherwise suffered under the Rule. Perhaps more importantly, the Rule is obviously not vague; it is a clear and simple proscription against self-recommendation. Appellants' argument that it is vague as applied to their conduct assumes that they did not in fact engage in solicitation. Yet as is detailed above, p. 9, solicitation is precisely what the courts below found appellants to have done.

CONCLUSION.

This case is not properly reviewed in this Court by appeal because there was neither enforcement of nor a decision in favor of the state statute challenged by appellants. In any event the case is squarely controlled in every important respect by this Court's decision in *Ohralik v. Ohio State Bar Association.* Therefore no substantial or important federal question is presented. Accordingly, the appeal should be dismissed or the judgment of the

9. The same rule upheld in *Ohralik, supra.*

Supreme Court of Pennsylvania should be summarily affirmed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979 No. 78-1521

ALAN B. EPSTEIN, SANFORD I. JABLON, RICHARD A. WEISBORD, AND ARNOLD J. WOLF, *Appellants*

v.

ADLER, BARISH, DANIELS, LEVIN & CRESKOFF, A Partnership, *Appellee*

APPELLANTS' REPLY TO MOTION OF APPELLEE TO DISMISS OR AFFIRM

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APPELLANTS' REPLY TO MOTION OF APPELLEE TO DISMISS OR AFFIRM

INTRODUCTION

In response to Appellants' Jurisdictional Statement on the appeal taken from the Supreme Court of Pennsylvania in the instant action, Appellee has filed a Motion with this Honorable Court to dismiss the appeal or affirm the judgment of the Supreme Court of Pennsylvania. It should be noted by this Court that Appellee's Motion is untimely in that it was not filed within the required period as provided by Rule 16 of the Rules of the Supreme Court of the United States. Accordingly, Appellee's Motion should not be considered by this Court. However, in the event that this Court does accept Appellee's Motion for consideration, Appellants submit that it is without merit and should be denied for the reasons set forth below.

ARGUMENT

I. Appellee's Motion to Dismiss or Affirm Materially Misstates the Record.

A. Appellee's Motion states: "Moreover, appellants were not and could not have been disciplined in or based on these proceedings." (p. 6)[1] This statement is not true. Following the decision of the trial court, the Disciplinary Board of The Pennsylvania Supreme Court reviewed the entire transcript of the notes of testimony at trial and dismissed the disciplinary complaint then pending against appellant Epstein. Thereafter, as appellee and its counsel know, following the decision of the Pennsylvania Supreme Court herein, and based solely upon that decision the Disciplinary Board has reopened the matter and advised Mr. Epstein that "The Supreme Court has concluded that [his] conduct constitutes a violation of the Disciplinary Rules of the Code of Professional Responsibility." The Board further advised appellant that unless he is able to suggest reasons to the contrary discipline by the Board may be recommended.

B. Appellee states that appellants "had commenced a large scale campaign to induce existing clients of [appellee] to terminate Adler Barish [appellee] and to hire [appellants] instead." (p. 4) To the contrary, as appellee knows, of the approximately 1,900 open cases being handled at appellee's office, appellants were handling approximately

1. References "p. " are to pages of the Motion of Appellee to Dismiss or Affirm; Reference "P. " are to pages of Appellants' Jurisdictional Statement. References "A- " are to pages in the Appendix to Appellants' Jurisdictional Statement. References "N.T. " are to pages in the transcript of the notes of testimony at trial in the Court of Common Pleas, Philadelphia County, Pennsylvania.

350 at the time they left appellee's employ. (N.T. 4.62-4.63) Appellants actually contacted only approximately 30 clients and there is no evidence that they ever considered, let alone intended, to contact even 100 of those clients for whose cases they were responsible. Moreover, as appellee also knows, several of those clients who appellants planned to contact actually came to be represented at appellee's firm because of a personal relationship with, or referral to, one of the appellants.

C. Appellee states that "appellant did not merely inform clients about their options, but rather suggested the course those clients should follow." (p. 9) There is neither a finding of fact nor evidence of record to support this statement.

D. Appellee's statement at the top of page 10 that appellants did not challenge "these findings of fact" is totally misleading since it follows one and one-half paragraphs of discussion which refers to two "facts" which were totally irrelevant to the issues in the case and other matters which were *not* findings of fact. Moreover, appellants did challenge these two "facts" on appeal to the Superior Court and found it unnecessary to challenge any relevant "findings of fact" by the trial court before the Pennsylvania Supreme Court.

E. Appellee states that "Like *Ohralik*, this case deals with . . . the same dangers (and proven instances) of overreaching and misrepresentation. . . ." (p. 11) There is no finding of fact, nor evidence of record, to support such a statement. To the contrary, the uncontroverted evidence establishes that of approximately 30 persons contacted by appellants, only approximately 15 decided to select appellants as their counsel and no one testified to any misrepresentation or exercise of any pressure, or even a suggestion by appellants to a client that he or she select appellants. On the other hand, it is clear that appellee

engaged in a pattern of sending letters to all clients on whose cases appellants had worked, *falsely* stating to those clients that appellee had reviewed the files and suggesting that upon such "review" there was evidence that appellants might have failed to do something necessary in the case. (e.g. Trial Exhibits, D-5, 7a, 11; N.T. 5.48-5.51)

II. The Appeal Draws Into Question the Validity of DR 2-103(A).

Appellee rightly acknowledges that this Court's appellate jurisdiction is appropriate whenever there is an occasion that a state statute (or Disciplinary Rule of statewide application), on its face or as applied, is repugnant to federal law. (p. 6-7) Questions I and III presented in appellants' Jurisdictional Statement urge this Court to hold that Pennsylvania Disciplinary Rule DR 2-103(A), as applied to appellants, is repugnant to the United States Constitution.

A. It is uncontroverted that the decision of the Pennsylvania Supreme Court is founded upon a holding that a state may constitutionally impose sanctions upon attorneys who violate disciplinary rules and that appellants' conduct violated DR 2-103(A). *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978); (A-41-47, 54). Indeed, the court did not and could not consider whether appellants' conduct constituted tortious interference with contract under state law unless and until it had so held. (A-44, 47, 54). Moreover, the court would not have found appellants' conduct "improper" (A. 51, 54) had it held that their conduct was either constitutionally protected or beyond the reach of DR 2-103(A), (See A-20, at n. 7 and accompanying text, Opinion by Hoffman, J., Superior Court of Pennsylvania). Therefore DR 2-103(A) is necessarily a "statute" whose validity is questioned as repugnant to the Constitution, because it is the *sine qua non* of the court's decision. 28 U.S.C. §1257(2); *Lathrop v. Donahue*, 367 U.S. 820 (1961); c.f. *Ohralik*, supra.

Finally, it is appellants' contention that DR 2-103(A) is repugnant to the Constitution of the United States since it prohibits lawyers in Pennsylvania from truthfully advising clients whose cases they have been personally handling of their right to counsel of their choice, and from providing to them truthful written material which they

can examine in the privacy of their own homes, churches, bar associations, offices, union halls, etc., out of the presence of such lawyers, and use, if they so decide, to make such a selection. There can be no doubt that this issue was presented to the Pennsylvania courts at every level of the proceedings below and thus appellants properly invoke the appellate jurisdiction of this Honorable Court. 28 U.S.C. §1257(2). [See Conclusions of Law 4 and 14 at A-9; Opinion of Superior Court at A-70]

B. Question III of Appellants' Jurisdictional Statement likewise properly invokes this Court's appellate jurisdiction. Its premise is that assuming arguendo that a disciplinary rule could be written to prohibit appellants' conduct consistent with the requirements of the United States Constitution, DR 2-103(A) as written fails to provide adequate limits upon the exercise of discretion by those who apply it, *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 694 (1959) and "to give [appellants] fair notice that their . . . conduct is forbidden. . . .", *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Thus, appellants argue, DR 2-103(A) as applied is repugnant to the First and Fourteenth Amendments to the United States Constitution. Appellants thereby properly invoke this court's appellate jurisdiction.

C. The jurisdictional basis urged by appellants is on all fours with those sustained by this court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In Re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) and *Friedman v. Rogers*, ---- U.S. ---, 59 L.Ed. 2d 100 (1979).

III. Conclusion.

Time and again this court has ruled that the First and Fourteenth Amendments to the Constitution protect conduct and that no matter of epithet applied to protected conduct nor vilification of the actor will serve to deprive it of its constitutional protection. Appellants' communications to clients were truthful. That they were set forth in writing and sent to the clients' homes for review before any action was taken by the client provided ample opportunity for deliberation and consultation with others and, if necessary, to overcome any conceivable pressure (though there is no evidence of any) that might have been exerted in the in person communication.

The importance of providing information to clients of their right to choose who will represent them when "their lawyer" leaves the firm with which he was practicing and how to exercise that choice, is manifest. C.f. *Bates*, 433 U.S. at 364. It is, therefore, most important that this Court make clear that states may not, by conjuring up imagined or speculative possibilities of less than perfect communications between lawyers and clients, effectively deprive the clients of access to such important information thus leaving them at the mercy of the people least likely to provide such information.

For these reasons, and the reasons set forth in Appellants' Jurisdictional Statement, this Honorable Court should deny appellee's motion, set this matter down for plenary hearing and decision and thereafter reverse the final judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 1979, three (3) true and correct copies of Appellants' Reply to Appellee's Motion to Dismiss or Affirm were personally served on Patrick T. Ryan, Esquire, as counsel for Appellee, at his office at 1100 PNB Building, Philadelphia, Pennsylvania 19107. I further certify that all parties required to be served have been served.

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